

# The investigation of anti-competitive conduct in the UK

An analysis of costs and benefits arising out of the application of the Fair Trading Act 1973 and the Competition Act 1980 in relation to the control of monopolies, complex monopolies and single-firm anti-competitive conduct

Mark Furse

BA (Economics and Law), LLM (International Business Legal Studies)

Submitted for the degree of PhD, University of Newcastle upon Tyne

This work was carried out under the auspices of the Faculty of Law, University of Newcastle upon Tyne

October 1999

NEWCASTLE UNIVERSITY LIBRARY

-----  
099 07212 0  
-----

Thesis L 6474  
-----

## ABSTRACT

This PhD is an examination into some of the costs and benefits arising from the application of the Fair Trading Act 1973 and the Competition Act 1980 to single firm anti-competitive conduct and complex monopoly conduct in the United Kingdom. The theoretical arguments advanced for the application of competition policy generally, along with the costs identified as likely to flow from this policy, are examined in an attempt to devise a criteria by which the application of competition policy in specific cases may be assessed. Enforcement activity of the Office of Fair Trading (OFT) and Monopolies and Mergers Commission (MMC) is examined to consider the extent to which previous actions have resulted in outcomes that may be identified or measured. Three specific investigations conducted between 1993 and 1997 are examined in some detail in Chapters 5, 6 and 7. These are related in Chapter 8 to more general experiences of those involved repeatedly with the operation of the regime in the United Kingdom. The experiences and evidence drawn together in these four chapters have not, to the author's knowledge, previously been so considered or set out. It is shown that the mechanism by which the policy is put into effect is heavily criticised, and that there are aspects of the procedure that impose burdens beyond those necessary to achieve the given result. In this context the experience of the American regime is used as a comparative example. The work concludes with a synthesis of the problems identified, and offers some possible solutions to the difficulties raised by the regime at the time of writing. Some consideration is taken into account of the future shape of the regime following the entry into force of the Competition Act 1998, although much of the work presented here remains valid to the operation of the new regime.

# List of contents

## Chapter one — Introduction 1

## Chapter two — Methodolgy 8

INTRODUCTION 8

CASE STUDIES AND THE COLLECTION OF DATA 9

*Interviews and questionnaires* 10

*Limitations on data – The OFT and MMC* 11

*Parties to the inquiries* 12

PREVIOUS MODELS 13

CHAPTER-SPECIFIC APPROACHES 14

*Chapter 5 (United Automobile Services)* 14

*Chapter 6 (Classified Directory Advertising Services)* 15

*Chapter 7 (Foreign package holidays)* 15

*Chapter 8 (Repeat users)* 16

## Chapter three — The Economic and Regulatory Framework: Benefits and Costs of Competition Policy Generally 18

INTRODUCTION 18

BENEFITS FLOWING FROM COMPETITION POLICY 19

*The economic framework* 19

Neo-classical economics 19

Principles of industrial economics, and monopoly markets 20

THE POLICY ‘SCHOOLS’ 24

Legislative goals 26

THE UNITED KINGDOM 26

AMERICA 28

THE EUROPEAN COMMUNITY 29

*Conclusion* 31

COSTS OF COMPETITION POLICY 32

*Introduction* 32

*Funding the regulation* 32

The UK 32

THE DGFT AND THE OFT 33

THE MMC 33

THE BI-PARTITE SPLIT 34

Investigations/Reports 35

*Costs to industry of competition policy* 36

Compliance costs 36

*Misapplication of policy* 36

Reduced competition? 37

MEASUREMENT OF COSTS AND BENEFITS 38

CONCLUSION 38

## Chapter four — OFT and MMC Reports: past activities and outcomes 41

INTRODUCTION 41

THE REPORTS	42
<i>Competitive Strategies</i>	43
Introduction	43
Predation	44
Raising or creating barriers to entry other than by predation	46
VERTICAL RESTRAINTS	46
CONTROL OVER AN ESSENTIAL FACILITY, PROPERTY RIGHTS AND INTELLECTUAL PROPERTY	48
PRICE-DISCRIMINATION	49
PREDATORY SUPPLY INCREASES	50
<i>Exploitative practices</i>	50
Excessive pricing and super-normal profits	50
Full-line forcing, tie-in sales, and line discounts	53
Distribution systems and refusal to supply	55
Miscellaneous	57
<i>Collusive practices and agreements falling short of merger</i>	57
<i>Reports as precedent</i>	58
UNDERTAKINGS AND ORDERS – THE FORMAL ‘OUTCOME’	58
CONCLUSION	60

## Chapter five — United Automobile Services 62

INTRODUCTION	62
THE INQUIRY	63
THE REPORT	64
<i>The input and views of the primary parties</i>	65
Your Bus	65
The OFT	67
United Automobile Services (‘United’)	68
The private parties	70
<i>Precedent value (the ‘reach-across’ effect)</i>	71
CONCLUSION	73

## Chapter six — Classified Directory Advertising Services 75

INTRODUCTION	75
THE MMC REPORT	76
<i>Yellow Pages</i>	78
<i>Third party involvement</i>	80
Significant third parties	82
KINGSTON COMMUNICATIONS (HULL) PLC	83
‘ANOTHER PUBLISHER OF CLASSIFIED DIRECTORIES’	83
THE UNDERTAKING AND ITS EFFECTS	85

## Chapter seven — Foreign Package Holidays 87

INTRODUCTION – THE INDUSTRY AND THE OFT	87
THE MMC INVESTIGATION	91
<i>The study</i>	92
<i>Airtours</i>	92
<i>Thomas Cook</i>	95
<i>Association of Independent Tour Operators</i>	96
CONCLUSION	99
<i>Endnote</i>	100

## Chapter eight — The Repeat Experiences of Professional Advisers and Consumer Groups 104

INTRODUCTION	104
PROFESSIONAL INVOLVEMENT IN COMPETITION INQUIRIES	105
<i>Lawyers</i>	105
Before the OFT	106
Before the MMC	107



THE QUESTIONNAIRE	107
THE VISIT	109
THE HEARING	109
The quality of analysis, and the outcome of the procedure	110
PREVIOUS REPORTS AS INDICATORS OF FUTURE FINDINGS	111
The attitude of clients to the process, and other procedural issues	111
PROCEDURAL ISSUES	111
CLIENTS' VIEWS	111
<i>The position of complainants</i>	112
Lobbying	114
<i>Economists</i>	115
THE RESPONSE OF THE OFT AND MMC TO ECONOMIC EVIDENCE, AND THE DIFFERING APPROACHES	117
COMPETITION WITH LAWYERS FOR FEES?	118
<i>Professional fees and costs</i>	118
CONSUMER GROUPS	119
CONCLUSION	120

## Chapter nine — Regulated Settlement vs Trial, The United States of America and the Consent Decree 122

INTRODUCTION	122
THE CONSENT DECREE PROCEDURE	125
<i>The Tunney Act and the Meaning of 'Public Interest'</i>	126
COSTS AND BENEFITS OF CONSENT DECREES	128
<i>Introduction</i>	128
<i>The burden of investigation</i>	129
<i>Litigation</i>	130
The risk of litigation	130
The costs of litigation	130
<i>The strengths of consent decrees</i>	131
<i>The Government's position</i>	131
<i>Compliance</i>	132
<i>Third party interests</i>	133
CONCLUSION	134

## Chapter ten — Conclusion 137

INTRODUCTION	137
PROCEDURE IN THE PRESENT REGIME	138
<i>Third party involvement</i>	142
THE BENEFITS OF APPLICATION OF THE LAW IN INDIVIDUAL CASES	143
THE 'NEW' REGIME	144

## Annex — The Competition Regime 147

INTRODUCTION	147
THE ORIGINS OF THE LAW	147
THE MODERN REGIME	149
<i>The Fair Trading Act 1973</i>	152
FTA, Part I (ss 1–12)	152
FTA, Part IV (ss 44–56G)	154
FTA, Part VII (ss 81–83)	156
FTA, Part VIII (ss 84–93B)	157
<i>The Competition Act 1980</i>	159
<i>Criticisms of the Acts</i>	161
REFORM, AND THE COMPETITION ACT 1998	163

## Bibliography 166

# Chapter one — Introduction

Competition law in the United Kingdom is, at the time of writing in mid-1998, in a transitional phase. The post-war emphasis on a system of regulation through investigation, with condemnation the exception rather than the rule, is being replaced by a prohibition system modelled very closely in most significant respects on the superior law of the European Community.<sup>1</sup> This change is in response to consistent pressure from industry that has bemoaned the application of two very different legal structures to the same conduct and situations. Government ministers continually emphasised during the passage of the Bill that its 'purpose is to ensure as far as possible a consistency with EC approach and thereby ease burdens for business'.<sup>2</sup> Section 60 of the Act imposes a strong duty on the courts and regulators to ensure consistency with Community law in the application of the Act.

Criticism has in particular been levelled at the Restrictive Trade Practices Acts 1976 and 1977 for their overly technical and arcane approach to the control of restrictive agreements, and to the system of inquiry into monopoly practices that operates under the Fair Trading Act 1973.<sup>3</sup> In relation to the latter the oft-voiced criticism has been that the regime as a whole lacks focus, that the 'public interest' test set out in the Act is vague and ill-defined, and that the burdens consequently imposed on businesses whose conduct is referred to the Monopolies and Mergers Commission (MMC) by the Office of Fair Trading (OFT) are greater than they should be, with the result that the regime as a whole is inefficient.<sup>4</sup> Further criticism has been made of the multiplicity of institutions involved in this process. It has been noted in the standard student text that '[o]ne of the extraordinary features of UK competition law is the superfluity of institutions involved' (Whish and Sufrin, 1993, 20).

A consequence of this is that a company whose conduct is under examination may have to deal first with the OFT, then with the MMC, and then may find itself lobbying the Secretary of State for Trade and Industry and the Department of Trade and Industry, and then having to deal again with the OFT, which may not itself agree with the stance taken by either the MMC or the Minister. The process can take several years from beginning to end, and affected third parties, whose rights are severely restricted under domestic law, may find little solace in the proceedings. These factors considered during the debate in the Lords on the Competition Act 1998:

'The Fair Trading Act balances carefully the respective roles of the Office of Fair Trading, the MMC and the Secretary of State. ... The Act enables wide ranging

---

1 The Competition Act 1998 received Royal Assent on 9 November 1998. The most fundamental changes made by that Act will take effect from 1 March 2000, 'the starting date'.

2 Lord Haskel, (1997) Hansard (HL) 17 November, col 417.

3 These statutes and the structure of the domestic competition regime are considered in further detail in the Annex, below.

4 These criticisms are most cogently made in the Fifth Report of the House of Commons Trade and Industry Select Committee, 'UK Policy on Monopolies' (1995, HC 249). This is dealt with in the Annex, below.



investigations into markets, and for matters to be considered against a general public interest test, albeit that competition is in practice a central feature of that test. Further, a very wide range of remedies may be imposed to remedy situations which are determined to be contrary to the public interest.’<sup>5</sup>

Where this process is carried through to its conclusion the MMC produces a substantial and finely-argued report, which will define the position of the companies subject to the reference in the market, identify any actions being taken that are against the public interest, and, where such actions are identified, make recommendations for combating these. These reports are widely considered to be unpopular with those whose affairs are reported in them. Notwithstanding the fact that companies may ask for sensitive materials to be removed,<sup>6</sup> the reports are revealing. They are also extensive, and the investigative process requires significant investment, in both time and money, from those companies required to participate.

At several points during the passage of the Competition Act 1998 comments were made about the burdens faced by companies under the current regime. Lord McNally made the point both during the second reading:

‘MMC investigations ... have sometimes been over-academic and over-leisurely. Only certain people in a company have the experience and knowledge to respond to an OFT or MMC investigation and they are often the same people at the sharp end of making a particular business a success. A long drawn out and otherworldly investigation may seem par for the course for the investigatory body, but it may be a daunting diversion of scarce management time for the company concerned’.<sup>7</sup>

and subsequently during the Committee stage:

‘there seems to be the idea that regulators are a good thing and that these are the guys in the white hats who go around the countryside slaying wrongdoers here, there and everywhere ... but a good deal of the evidence that we hear from industry is that the work of the regulators can be leisurely, academic and far removed from the realities of running a business’.<sup>8</sup>

Although such criticisms have been voiced in many quarters there is little evidence, other than the anecdotal, to sustain an accurate assessment of the costs to industry in particular of the domestic regulatory process for the control of monopoly conduct. The author has been able to find only one limited study conducted for the Department of Trade and Industry by Ernst and Young (Ernst & Young, 1993).<sup>9</sup> It has been well observed elsewhere that ‘this area of political economy attracts an unusual mixture of sentiment, reformist doctrine and fundamental questions of economic organisation’ (Hunter, 1966, 17).

The purpose of this study has been to collect and present the appropriate evidence by which a more accurate assessment of various aspects of the domestic procedure might be made. It has become clear in this process that it will not be possible to derive a full cost benefit analysis of the operation of the regime. Substantial amounts of data will be missing from both sides of the equation. On the costs side evaluation is difficult, and relies to a large extent on the willingness of companies to divulge their own costs in relation to any particular inquiry. Sensitive to charges of rent seeking,<sup>10</sup> and aware of the adverse publicity that can flow from such situations it is not

<sup>5</sup> Lord Simon of Highbury, (1997) Hansard (HL) 17 November, col 443.

<sup>6</sup> Under the Fair Trading Act 1973, s 83 (3) and (3a).

<sup>7</sup> Lord McNally, (1997) Hansard (HL) 30 October, col 1184, during the second reading.

<sup>8</sup> Lord McNally, (1997) Hansard (HL) 17 November, col 439.

<sup>9</sup> This study is considered in more detail in Chapters 2 and 3.

<sup>10</sup> Rent seeking, which may be defined as the investment of resources in the expectation of reaping supernormal profits, is considered further in Chapter 3, below.



surprising that this is an area that companies are reluctant to discuss. Professional advisers who have been contacted in relation to this work have in some cases been willing to comment on general aspects of the procedure, but will generally not discuss specific cases, and will not divulge their fees with exactitude, although most have been prepared to indicate the general range of fees that would apply to certain scenarios.<sup>11</sup> While companies may be prepared to discuss the direct costs they have faced few are either willing or able to place a figure on the staff involvement, with extensive involvement often required from senior managers or board level. The regulatory agencies are also sensitive to discussing such areas, and the MMC, which bears the bulk of the burden, has only recently implemented internal accounting and time allocation systems that would permit specific costs to be estimated in relation to individual inquiries. The MMC has not participated in this research,<sup>12</sup> and the OFT has been involved only to a limited extent. A consideration of the more general costs that may be imposed by the operation of a competition law regime, such as stifling of entrepreneurial activity, or distortions produced by the inappropriate enforcement of the law, have not been dealt with, although the theoretical debates are considered in Chapter 3.

Assessing the benefits of competition law also presents great difficulties for the practical researcher. Benefits may be ascribed to enforcement in individual cases and to the general application of the regime. In the first category one may place, for example, the benefit reaped by the small competitor saved from another's predatory pricing, or the consumer freed from bundling requirements. The more general benefits that are claimed for competition policy are both difficult to measure, and cannot be assigned to any particular case. As far as is reasonably possible in a study which focuses on the operation of the law and legal processes, benefits that flow from the individual cases considered here are identified. Further consideration is given to the question of whether the regulatory structure as it stood at 1 January 1998 was conducive to the achievement of significant benefits from its application.

Although the new Competition law is not considered in this work, albeit that it is sometimes referred to where appropriate, its reforms do not sweep away the system that is at the heart of this study. Two Acts provide the platform for the actions here considered, the Fair Trading Act 1973, and the Competition Act 1980 (CA 1980). The latter Statute was introduced in the salad days of the previous Conservative government, with the aim of providing a swifter resolution of anti-competitive situations than was possible under the FTA. Whether the CA 1980 has failed is a matter of doubt, but it has certainly not been followed through to its conclusion in many cases. Both Acts relate to the control of unilateral anti-competitive conduct, although the FTA has a wider remit, and the monopoly provisions cover both 'scale' and 'complex' monopolies.<sup>13</sup> The FTA also provides the system for merger control in the United Kingdom. The Competition Act 1998 will repeal those parts of the CA 1980 dealing single-firm with anti-competitive conduct.<sup>14</sup> Although the CA 1998 will, following the end of the transitional period, effect a dramatic change in the application of competition law in the United Kingdom, it does not signal the complete abandonment of the earlier regime. Monopoly investigations of the type considered in this work will remain a feature of the system, and the appropriate parts of the Fair Trading Act are left intact. As was noted in the introduction of the Act in the Lords,

<sup>11</sup> These results are presented in detail in Chapter 8, below.

<sup>12</sup> The extent of the information obtained from the MMC, and its access policy, is discussed in Chapter 2, below.

<sup>13</sup> These are defined, and the relevant provisions discussed, in the Annex, below.

<sup>14</sup> Section 17(1) of the act provides that 'Sections 2 to 10 of the Competition Act 1980 (control of anti-competitive practices) shall cease to have effect'. Section 1 of the Act repeals in their entirety the Restrictive Practices Court Act 1976, the Restrictive Trade Practices Acts 1976 and 1977 and the Resale Prices Act 1976. This provision will have force from 1 March 2000.



‘the Fair Trading Act provisions enable wider market investigations than are possible under the prohibitions. Essentially they enable investigations where competition issues arise fundamentally from the structure of the market rather than from restrictive agreements or of ... specific abuses.’<sup>15</sup>

A similar justification for the retention of these provisions was set out in the Consultation Document that accompanied the Draft Bill published in August 1997 (DTI, 1997a):

‘6.21 In large measure, the scale monopoly provisions will be replaced by the prohibition of abuse of a dominant position. Under the prohibition, abuse by a single dominant firm may render that firm liable to a fine and other action to bring the infringement of the prohibition to an end.

6.22 A prohibition-based approach is, however, less able to deal with the situation where, for example, an individual abuse has been tackled but where there is a prospect that other abuses by the dominant company may continue in the future. In such a situation, structural remedies to reduce the dominant position of the firm concerned may be more appropriate than relying on the prohibition alone to deter future abuse. Taking action to reduce market power in this way would be possible under the scale monopoly provisions of the Fair Trading Act, but is not readily achievable under a prohibition-based approach. There is accordingly an argument that the scale monopoly provisions of the FTA should be retained for use in these limited circumstances.

6.23 We are therefore currently not persuaded that it would be right to repeal the scale monopoly provisions. However, we consider there is a case for restricting the use of these provisions to exceptional circumstances. Therefore we believe they should only be used where there has already been proven abuse under the prohibition *and* the DGFT believes there is a real prospect of future different abuses by the same firm. In such cases, the matter should be investigated by the MMC. ...’

The affect of this therefore is that scale monopoly investigations will now be undertaken only where there has already been a finding of a breach of the Chapter II prohibition of the 1998 Act. However, where investigations of the nature described in this work do continue to be undertaken, it will be under approximately the same route and involving the same institutions,<sup>16</sup> albeit with less frequency than has been the case in the past. However, the scale monopoly investigations here defended by the DTI may be expected to fall into desuetude. The experience gained under the prohibition system operated by the European Community is that recidivism, while not eliminated, is rare.

Three specific case studies form the core of this work. These cover the gamut of possibilities under the relevant legislation. In Chapter 5 the focus is on an investigation brought on the basis of the Competition Act 1980 into the affairs of a bus company operating in Darlington. The work here relates to two competitors, the complainant and the subject of the investigation, and the Office of Fair Trading. Chapter 6 deals with a scale monopoly investigation under the remit of the Fair Trading Act into the conduct of a dominant company, Yellow Pages, with a market share of some 85%. This Chapter also considers the relationship of many of the third parties who to a varying degree contributed to the inquiry. Finally Chapter 7 deals with the complex monopoly enjoyed by various firms in the market for foreign package holidays. In this Chapter the emphasis is on the more complicated situation facing a company that must consider also the reactions of its major competitors to the inquiry. Both of the latter two cases involved both the OFT and the MMC, although the focus of the work here is very much on the MMC stage of the

<sup>15</sup> Lord Simon of Highbury (1997) Hansard (HL) 13 November, col 263.

<sup>16</sup> Although the MMC is being replaced by a new ‘Competition Commission’, the latter will assume the responsibilities of the former, and will initially be composed of the same staff. This is to take effect on 1 April 1999. Detailed procedural rules will not be put into place until the new system has bedded down.



proceedings, which imposes by far the greater burden on the participants. Unusually both of the MMC inquiries resulted in the making of recommendations and the process by which these were negotiated and drawn up has also been dealt with.

In order to support the evidence gained from this sample of cases, professionals and consumer groups with repeated involvement in the system have been interviewed and the results are reported in Chapter 8. Because the process is a legal one, and is approached by firms on that basis, the bulk of those interviewed are lawyers. Economic consultants from the three largest firms have also participated, along with the Consumers' Association and the National Consumers Council.<sup>17</sup> As indicated in Chapter 8 these results largely support those drawn from the three case studies.

In each case the aim has been to derive as much information as possible about the burdens imposed on those subject to investigation by the procedure. Although reference is made elsewhere in this work to 'costs and benefits' these are usually qualified, and should be read alongside the qualification here. This is that companies have not discussed their costs in detail, but have been prepared to comment on the burdens imposed upon them. Thus, while not being prepared to give detailed analysis of the time involvement required of staff, or the salaries paid to those staff, they have indicated the extent to which their businesses have suffered adverse impact by having staff devote their time to the inquiry rather than to more normal commercial matters. In most cases companies have been prepared to indicate the numbers of staff involved, an estimate of the time which they spent on the inquiry, the level of overall disruption to the business, and the reliance on external resources. All have been willing to comment on their views of the efficacy of the process, and the quality of the analysis. One aspect of this research then has been to focus on whether particular parts of the process are unduly inefficient or burdensome, or in the alternative are perceived as being particularly beneficial by those under investigation. Consideration has also been paid to the extent to which third parties have been able to participate in the process and whether legitimate interests are being frustrated by costly or obscure proceedings. The evidence presented here would not support such a negative conclusion.

As will be seen the reaction of most companies to the process is not as adverse as that which received wisdom would have as the case. In almost every case, even where a recommendation that might be considered to be against the company's interests has been made, participants involved in the investigations have been complimentary as to the quality of the analysis, and the report. However, criticism of the process, its legitimacy as a whole, and of various procedural aspects, in particular of the switching between institutions, has been prominent and universal. No respondent has suggested that there should not be a competition law regime, merely that the present one is not that which should be in place. It is in part because company responses must be treated with care, in particular where they are subject to continued oversight through the operation of an undertaking, that other evidence has been sought to support their assertions. It is not perhaps in the best interests of companies to appear to be overly critical of the regulators with whom they may have to deal in the future. Companies were not asked detailed questions about the outcomes of the case studies. It was felt that there would be little to be gained in reopening arguments that are considered in detail in each of the reports in question, and that the primary thrust of this research is on the process, and the general impact of that process, and not the results of that process in each individual case. Not all comments made to the author by company staff or by those interviewed in respect of Chapter 8 have been used. In each case a guarantee has been given that no sensitive material will be published, other than anonymously, without the consent of the respondent.<sup>18</sup>

<sup>17</sup> A full list of respondents is given in Chapter 8, below.

<sup>18</sup> The research methodology and reporting policies form the subject of Chapter 2, below.



The general background to the legislation is set out in the Annex. In Chapter 3 the economic arguments advanced in support of competition policy are considered, along with the goals of competition law both specifically to the United Kingdom and more generally. Although this work is not, strictly, a cost-benefit analysis, even an analysis of the burdens imposed by the procedure, and the efficacy of those procedures cannot be properly considered without an understanding of the benefits that one may expect to flow from the effective operation of competition policy. Chapter 4 is a review of a range of the previous activity undertaken by the OFT and MMC, with the emphasis on the more recent because these more accurately reflect current thinking and trends in a subject which is susceptible to changing patterns of enforcement in response to developments in both industry and industrial economics. Between them these three chapters contain the material that would be found in a traditional literature review, although here the approach has been to present the arguments in a themed development.

Perhaps because of its idiosyncrasies competition law in the United Kingdom is not a subject that is widely studied. There have been few textbooks, either for practitioners or students, that take it as their focus, and the only major study of the Fair Trading Act was a practitioner text published in 1974 (Cunningham, 1974). The authoritative texts that deal with the subject usually do so alongside discussion of European Community law (e.g., Freeman and Whish 1990; Livingston 1995; and Whish and Sufrin, 1993). However, in this work European Community law is considered only fleetingly.<sup>19</sup> While it is law in the United Kingdom, and may in the appropriate circumstances be relied upon and form the basis for actions in the national courts, it bears no formal relationship to the monopoly references founded on the Fair Trading Act. It is of more obvious impact in relation to the CA 1980, having influenced the wording of that statute. It is the law of the United States that has been turned to alongside the domestic law in this study. In Chapter 9 the reader will find a discussion of the procedures followed in America when consent decrees are being negotiated and implemented under the authority primarily, but not exclusively, of the Sherman Act.<sup>20</sup> This is not an inappropriate analogy to draw with the United Kingdom regime, although there are clear differences, both in terms of the details of the legislation, and also in terms of legal culture. However, the essence of the position in America is that although the Government can, and does, bring both criminal and civil cases against companies in breach of the antitrust laws, with increasing frequency it reaches a negotiated settlement following a protracted and, for the company, gruelling investigative process. The major difference is that this process is set within a system that relies on a prohibition supported both by substantial penalties, including the threat of imprisonment, and strong third party rights including the notorious availability of treble damages. The evidence in this Chapter is drawn from existing literature, conference presentations, and from interviews with the Senior Trial Attorney at the Department of Justice, and antitrust practitioners, primarily based in Washington, DC.

As noted above it has not been possible, as a result of this study, to say that 'X case cost Y money and resulted in Z benefit', or that overall the operation of the domestic law costs Y and leads to Z benefit. However, it has been possible to gain a clearer picture of various aspects of

<sup>19</sup> EC competition law is based primarily on articles 85 and 86 of the Treaty of Rome, which are directly applicable law in the United Kingdom, and, with the exception of article 85(3) are directly effective law, creating rights and obligations which national courts are, in line with Community jurisprudence and the general obligation drawn from article 5 of the Treaty, obliged to give effect to. The Merger Regulation, 4064/89, supplements these two articles in the specific area of merger control where there is a 'Community dimension'. Note that from May 1999 the Amsterdam Treaty entered into force. *Inter alia* this amends the Treaty numbering in a tidying-up process. In particular arts 85 and 86 become new arts 81 and 82, although the text is unaffected. Throughout this work the 'old' treaty numbering is adopted.

<sup>20</sup> The terms of the Act, and a full discussion of the procedure is set out in Chapter 9.



the procedure than has hitherto been reported. The extent to which a company is required to invest time and resources to an inquiry, and the ways in which these responses are managed, are clearly considered, and much evidence is now available to support these points. The general costs that a company might expect to incur on legal and economic support is adduced with reference to figures given by a wide range of practitioners in those areas. The attitudes of both companies and advisors to the process, and to those elements of it which are seen as either particularly frustrating or particularly efficacious, along with reasons for that analysis are set out. Particular attention is paid, in the absence of rights enforceable in the courts, to third party participation in the system. Both the motives of these parties, and the extent to which they have found the system to be accessible are considered on the basis of evidence collected from interviews and questionnaires. In the conclusion to the work the results are brought together, along with suggestions for reforms of the institutional arrangements and investigative approaches that remain pertinent under the new regime.

Throughout the work the aim has been to ground it in the law, and not in economics, and the arguments and evidence should be assessed on that basis. An economic study of the same cases would produce different results, but not, it is hoped, results that would conflict with those presented here. Crucially the tools of analysis that would be employed would be very different. This work relies for the most part on qualitative evidence, and draws qualitative conclusions. An economic study would likely rely on, and produce, quantitative data. For the most part those who have provided evidence in relation to any of the studies set out here have themselves accepted that the process is more a matter of law than of economics. At the same time it is neither possible, nor desirable, to ignore the economic issues that, after all, form the basis for competition law. The aim has been in this work to provide sufficient explanation of the economic arguments to clearly explain the theoretical bases for the law, and the criteria by which its efficacy may be assessed. This work is up to date, but does not draw upon the powerful tools increasingly provided by econometrics. As will be seen in Chapter 8 such tools are often not employed even before the regulatory agencies, which may lack the expertise to evaluate the material that would follow their employment.

# Chapter two — Methodology

## INTRODUCTION

It has been noted elsewhere that '[a]nti-trust will only make sense ... if Government ... is able to apply it at less cost to society than the welfare improvements which it is designed to bring about' (Liesner and Glynn, 1987, 349), and it is the *application* of anti-trust with which this work is primarily concerned.<sup>1</sup> As was made clear in Chapter 1, this work is not, *strictu sensu*, a cost-benefit analysis, although to the extent that 'cost-benefit analyses have proceeded by simply adding up total money costs and benefits regardless of who receives them' (Broadway, 1974, 926) this work may be considered to be akin to the traditional cost-benefit analysis. Williams also endorses the approach 'where you at least state the kind of empirical information you would need to make a calculation or an estimate of the benefits and costs' (1972, 200). The traditional role of cost-benefit analysis is to measure the aggregate money gains and losses to assess a project's efficiency, in the sense that 'if the aggregate is positive, this is taken to indicate that the gainers could compensate the losers and still be better off after the project is undertaken' (Broadway, 1974, 926). However 'such studies involve estimating changes in consumers' and producers' surpluses arising from the policy change by looking at the appropriate areas bounded by demand and supply curves' (Broadway, 1974, 937) and that is not being attempted here. The primary aim of this work has been to measure the costs of Competition Act and Fair Trading Act inquiries to those participating in them, and to consider the extent to which various procedural aspects are a factor in determining those costs. While outcomes have not been ignored, and are considered where they are identifiable, it is not the purpose of this work to critically review the conclusions reached by the regulatory authorities, rather to consider whether the identifiable outcomes have benefits that might outweigh the costs of the procedure by which they have been obtained, and this work is founded in law, not in economics.

Broadly this work may be classed as 'qualitative research', by which is meant that it 'produces findings not arrived at by means of statistical procedures or other means of quantification' (Strauss and Corbin, 1990, 17) and, as with qualitative research generally, data has been gathered by a variety of means. A particular strength of qualitative methods is that they 'can give the intricate details of phenomena that are difficult to convey with quantitative methods' (Strauss and Corbin, 1990, 19).<sup>2</sup> This study is *not* a statistical or econometric quantity-based work.

In Part One (chapters 1–4) the work has been driven by existing literature, whether in the form of original materials (such as OFT and MMC reports) or in the extensive body of literature,

---

<sup>1</sup> In fact, as is suggested in the Annex the full benefits will accrue not just from *application* of anti-trust, but also from its existence if companies are presumed to act with regard to the law and not just with regard to the vigour with which the law is enforced (see generally Frazer, 1995).

<sup>2</sup> Indeed, one respondent, a respected economist interviewed for Chapter 8 referred to this work as 'a qualitative cost-benefit analysis' (int. RE1).



much of it American, relating to antitrust law and regulation. For Part Two (Chapters 6–10) original data has been collected, and integrated with published commentary where it is available. The studies of specific investigations set out in Chapters 5, 6 and 7 are unique; Chapter 8 is based on wholly original interviews; and Chapter 9 is based in part on interviews, coupled with a study of existing literature. Throughout the work original material has been collected by way of interviews (all of which have been recorded) and questionnaire surveys.

## CASE STUDIES AND THE COLLECTION OF DATA

The purpose for which data is to be gathered will often determine the method of research that will be used, but further considerations, such as the availability of data, intrude. While some researchers engaged in qualitative research believe that data should *not* be analysed, the aim of all such research must be to derive findings that are accurate and that may form the basis for theories. It is often the case that quantitative methods will also be combined with qualitative research effectively in the same project (see generally Strauss and Corbin, 1990). In a qualitative project the research question ‘identifies the phenomenon to be studied [and] tells you what you specifically want to focus on’ (Strauss and Corbin, 1990, 38). However, having once defined the question (see generally Chapters 1 and 3 *infra*) it has been necessary to narrow the focus of the research to a manageable sample, and ‘the first task in sampling is to define the population of interest’ (Singleton et al, 1993, 140) from which that data can be gathered (and the relevant ‘type of unit’), and the method of population sampling, a matter of quantitative research. In undertaking purely quantitative research previously successful projects may serve as the model for future work, particularly where the purpose of the research is to allow comparisons to be drawn over time. In qualitative research this reliance on previous projects is less important. Like many projects this work adopts a variety of approaches, and is not underpinned by a single methodology. Chapters 5, 6 and 7 are highly specific case studies, while Chapter 8 attempts to derive more general results from a wider population. Generally the population relevant to the whole work is the group of organisations, both private and public, which have participated in the formal investigation of anti-competitive conduct in the relevant time period – broadly 1993–1997 (the time period over which this research has been conducted has necessarily restricted the range of inquiries that fell to be examined – and work on the first case study, Chapter 5 (*United Automobile Services*), demonstrated that the lapse of time made already scarce information yet more difficult to obtain). However, in Chapter 9, which considers one aspect of the regime in the United States of America a selective set of interviews is in part relied on, and in Chapter 5 a questionnaire survey of bus companies is used to evaluate a wider argument relevant to the specific case under examination.

The three reports which form the basis of Chapters 5–7 are a sample of a wider group, and ‘there is no way of knowing just how representative a given sample is’ (Singleton et al, 1993, 145). Further the selection of cases (‘nonprobability sampling’) means that it is not possible to estimate sample precision or to calculate sampling errors. However, the method adopted remains valid and, indeed, ‘in many instances this form of sampling either is more appropriate and practical than probability sampling, or is the only viable means of case selection’ (Singleton et al, 1993, 159). This is true in particular where, as is the case here, there is only a small population from which samples can be drawn, and it may be more effective to leave the choice of cases to expert judgment rather than to random probability. A forceful argument for such an approach may be made where non-co-operation of those who would be part of the relevant population is likely, and here ‘the researcher must either accept a nonprobability method of case selection or abandon the study altogether’ (Singleton et al, 1993, 159). The general failing of such a method



of research is that, whilst it may be unavoidable, and offers stronger inferences than mere convenience sampling, 'such inferences are very much dependent on the researcher's expert judgment and intuition' (Singleton et al, 1993, 161).

Once the three sample cases had been selected a further sampling was required of those participating in each of the cases. For these purposes two populations were identified: [1] those with a significant role in the investigation (a unit was identified as playing a significant role if it was a subject of the investigation, or involved in making submissions to the investigation that went beyond brief contacts with either the OFT or the MMC, or was likely to be seriously affected by the outcome of the investigation); [2] those with a peripheral role (broadly this group corresponded to those who made their views known to the OFT or MMC by way of a letter or questionnaire, but who did not play an active role in the investigation, and were not themselves subject to investigation). For population [1] the sample size corresponded in each case to the total population, and for population [2] the total population that could be practicably contacted formed the sample (complete statistics and lists of those contacted are given in each chapter). In Chapter 8 the population was those who, in a capacity other than that of a company subject to the regime, have repeat experience of involvement with MMC or OFT investigations (primarily lawyers and economic consultants): sample selection was dictated largely by the preparedness of members of the target population to participate in the research. The consistency across answers given suggests that this chapter may be a reliable indicator of the experiences of the total population.

### *Interviews and questionnaires*

Questionnaires have been used as the mechanism for gathering data from the non-primary parties (population [2]), and interviews for gathering material from primary parties (population [1]).<sup>3</sup> Interviews were also used widely in Chapter 8. As Singleton et al note, questionnaires or 'a brief encounter for the purpose of administering a survey [do] not provide a very good understanding of the context within which behaviour may be interpreted over an extended period of time' (1993, 254). Whilst each OFT or MMC investigation is a discrete event the reference period may extend upward from 6 months, and it is likely that the primary parties may have had significant informal contacts before the formal reference is launched. The primary parties involved in the investigation into foreign package holidays (Chapter 7), for example, were involved in close contact with the OFT and then the MMC from August 1995 through to November 1997, and in fact had a history of involvement with the OFT over a much longer period before the formal investigation that resulted in the MMC reference was made.

Four different sets of questionnaires have been used in the course of this work, and the purpose of each was also different. Where possible closed questions were asked, and questionnaires have been designed to test specific propositions (Chapter 5) or to determine matters that may be defined with a degree of exactitude. However, open questions have been used to draw out broader attitudes in all cases.

---

<sup>3</sup> All interviews were tape recorded and full transcripts made. Transcripts are retained by the author, and to comply with confidentiality commitments cannot be released.



### Limitations on data – The OFT and MMC

Neither the OFT nor the MMC can disclose full information about competition inquiries, and the MMC in particular is aware of the sensitive nature of information disclosed to it in the course of its inquiries. In November 1996 the MMC drafted a ‘code of practice on access to information’, which is reproduced here in footnote form.<sup>4</sup> The OFT was prepared for its staff to be interviewed where the work related directly to reports published under its auspices, as opposed

---

<sup>4</sup> *Monopolies and Mergers Commission, Code of Practice on Access to Information*  
About the code

- 1 The *Code of Practice on Access to Government Information* came into effect in April 1994. In line with the recommendations of the Nolan Committee, the Government subsequently announced that its policy on access to Government information should be extended to non-departmental public bodies such as the Monopolies and Mergers Commission (the MMC).
- 2 The MMC Code of Practice has been drawn up having regard to the *Code of Practice on Access to Government Information* and the recommendations of the Nolan Committee, in particular the *Standard of Best Practice for Openness in Executive NDPBs and NHS bodies*.

#### The MMC

- 3 The role of the MMC, set by statute, is to investigate and report on matters referred to it by, among others, the Secretary of State for Trade and Industry, the Director General of Fair Trading and the regulators of the privatised utilities. The matters which may be referred include mergers, monopolies, anti-competitive practices, and the modifications of conditions of licences granted under the various privatisation Acts.
- 4 All MMC reports are published. Copies of most reports may be purchased from the Stationery Office (formerly HMSO). A list of published reports and current inquiries is available from the MMC library and can also be accessed on the Internet. Each report includes a summary of the MMC’s conclusions, detailed reasons for the conclusions, extensive background information on the matter investigated, a summary of the evidence submitted by interested parties and, where appropriate, recommendations. The MMC must have regard to the need to exclude from its reports, so far as is reasonably practicable, matters relating to individuals or businesses where publication might be seriously prejudicial to the interests of that individual or business. In addition the Secretary of State has the power to exclude from a published MMC report material whose publication would be contrary to the public interest.
- 5 In carrying out its investigations the MMC obtains information relating to businesses and is required by statute to disclose it only for strictly defined purposes, including disclosure in a report or for the purpose of facilitating the performance of its functions.
- 6 The investigation of any particular matter is carried out by a group of members (supported by staff and sometimes by outside consultants). It is the group who decides what disclosure of information relating to any business is necessary for the purpose of facilitating the performance of the functions of the MMC and what material is necessary to include in the report.
- 7 The investigations frequently concern companies whose shares are listed on The Stock Exchange and the conclusions of the MMC may well affect the share price of the companies concerned.

#### Information which the MMC will release

- 8 The MMC already publishes, or otherwise makes available, information concerning its role and its relationship with other regulatory bodies. Copies of the *Role of the MMC*, the *Annual Review*, *Financial Statements*, the *Role, Strategy and Targets* document, *Assessing Competition*, and the *Memorandum of Understanding* between the MMC and DTI are available from the MMC library. And as indicated above, MMC reports are published and are available from the Stationery Office. In addition, the MMC will release, in response to specific requests, information relating to its activities and to its dealings with the public. There can be no commitment that documents, as distinct from information, will be made available in response to such requests.

#### Information which the MMC will not release

- 9 Certain classes or items of information should properly be kept confidential and will not be disclosed by the MMC. These are set out in detail in Part II of the Code of Practice on Access to Government Information. Examples of such information as relating to the MMC include:
  - information disclosure of which is unlawful, for example under s 133 of the Fair Trading Act 1973 or under insider dealing legislation
  - information whose disclosure would harm (or risk harm to) the frankness and candour of discussion within the MMC, including information concerning the deliberations of any group or the opinions of any member or group, and advice or analysis of issues provided to a group
  - information which is or will soon be published, or whose disclosure would be premature in relation to a planned announcement or publication
  - information whose disclosure would harm (or risk harm to) the frankness and candour of discussion within Government or between public bodies and regulatory bodies including confidential communications between Government departments, public bodies and regulatory bodies



to matters referred to the MMC. The MMC was able to disclose the global cost of each investigation where it had that information available but was not prepared to allow its case officers to discuss the matter, and it is not possible to know how the overall MMC costs break down, or where the burden of the work lay.

### *Parties to the inquiries*

All those who give evidence or make submissions to the MMC and OFT are listed in the published reports, although on rare occasions parties may be allowed to present evidence anonymously. The reports do not provide the addresses of parties, and it can thus be difficult to identify all parties even where names are given. However, not all are equally involved in the investigations, and a distinction may be drawn between those who fall within the terms of the reference (the 'primary parties'); third parties making substantial submissions ('substantial third parties', which may include competitors of the primary parties, consumer bodies, trade associations and similar bodies); and other third parties who may contact the MMC by way of a single letter,<sup>5</sup> or may be responding to questionnaires sent out by the MMC. It is, for instance, common practice for the MMC to contact the largest 200 customers of the major firms involved in investigations. As is noted in Chapter 6 the burden on this latter group does not appear to be significant.

---

#### 4 *Cont.*

- information whose disclosure without the consent of the supplier could prejudice the future supply of such information
- information whose disclosure could lead to improper gain or advantage or prejudice: the competitive position of the MMC or other public body or authority; negotiations or the effective conduct of personnel management, or commercial or contractual activities
- personnel records
- information, opinions and assessments given in confidence in relation to public employment and public appointments
- information which the MMC does not itself possess, or which is already published, or which the MMC does not consider to be reliable
- requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which (because of the amount of information to be processed or the need to retrieve information from files not in current use) would require unreasonable diversion of resources

#### Timing

10 The MMC will deal with your request as quickly as is practicable. The target for response to simple requests for information is 20 working days from the date of receipt. This target may need to be extended when significant search or collation of material is required. Where information cannot be provided under the terms of the Code, an explanation will normally be given.

#### Charges

11 Where a request for information will cause us a significant amount of work we may need to charge you. We will write to you before any work is started and give you an estimate of the cost. If you decide to go ahead with your request, once we have received payment we will start the work. If the actual cost is less than the estimate we will make a refund to you. If the actual cost is likely to exceed the estimate we will send the information already extracted and will ask for an additional payment if you want the work to be completed.

12 There will be no charge if the information you have asked for costs less than £100 to supply. If you have paid for work to be done and we decide that the information cannot be released we will refund your money.

#### Appeals procedures

13 If we decide not to send you the information you have requested we will explain why it is exempt from disclosure. If you disagree with our decision you should ask the person who has written to you to look again at your request. You should explain why you are questioning the decision. Your appeal will be reviewed. If you are still dissatisfied with the result of your appeal you should write to the Secretary of the MMC. She will review your request and make the final decision.

14 You may use the appeals procedure if you think a response has taken too long or if you think you have been charged too much. There is no charge for using the appeals procedure.

<sup>5</sup> In *Classified directory advertising services* (MMC, 1996c), for instance, several members of the public complained to the MMC about the splitting of a region previously covered by one edition of the *Yellow Pages* into two regions each with their separate edition.



In all cases the primary parties to the investigations agreed to be interviewed, and in Chapter 7 (foreign package holidays) some of the parties were interviewed more than once. While those who allowed themselves to be interviewed were prepared to discuss in some detail their organisation's involvement with the investigation they were not prepared, in any instance, to divulge either the direct or indirect costs<sup>6</sup> to the organisation in any degree of specificity,<sup>7</sup> and it has not been possible therefore to derive figures that indicate with even an approximation what the cost of such investigations is to the concerned parties. However, a picture of the likely 'burden' does emerge, and, following the research carried out in Chapter 8, it is possible also to estimate some likely costs in relation to outside legal and consultancy bills. Various comments on the effectiveness of this likely expenditure were made by those interviewed for Chapter 8, and these are reported in that chapter.

## PREVIOUS MODELS

In the absence of detailed prior work examining the application of UK competition law on a case by case basis (work prepared for the DTI by Ernst & Young (1993) has been widely cited but makes general conclusions from a small sample<sup>8</sup>)<sup>9</sup> other models have been turned to. Perhaps

<sup>6</sup> The word 'costs' is given here the meaning that would be given to it by a management accountant, allowing for the calculation of expenses directly incurred by the company, whether these lay in internal cost centres, or in the employment of external resources.

<sup>7</sup> It was reported in the media that the Chairman of Airtours had announced that the company had set aside £1m to cover the costs of the forthcoming investigation. The company secretary, who was interviewed for this work twice, felt that it had been a mistake to make such a public comment, and would not confirm that the figure Airtours spent was indeed in this region.

<sup>8</sup> The research methodology set out in the Ernst & Young paper is as follows:  
'Ernst & Young commissioned the specialist business market research company Consensus Research International to conduct a survey amongst companies which have been involved in recent MMC investigations. The overall objectives of the assignment were to gain the views of companies on their dealings with the MMC and to establish whether they believe that changes in the current procedure are desirable.'

Twenty-seven interviews were conducted. 25 with companies which have been involved in recent MMC investigations, and two with specialist competition lawyers.

Of these four were carried out at the pilot stage through personal in-depth interviews, and the remaining 23 were carried out by telephone. Both law firms were involved during the pilot phase.

The sample universe comprised the 150 or so organisations which have been directly involved with the MMC since the beginning of 1990 (ie the companies at the forefront of MMC inquiries over the last two to three years). Note that only one subject from each investigation was eligible for interview.

A quota control was imposed on the type of referral, in order to reflect the fact that, of the 50 or so referrals to the MMC since the beginning of 1990, about one-third have been monopoly referrals and the rest merger.

Respondents were Chairmen or Chief Executives, or a member of the senior management team nominated by the Chief Executive where such a respondent played an active role in the MMC investigations at an appropriately senior level – eg Company Secretary ...'

The combined effect of this selection process is that 8 interviews (possibly conducted over the telephone) were held in relation to monopoly investigations, and that only one party in each of these investigations was approached. Only 2 external advisers were approached, and it is unknown whether these had been involved with monopoly references. Results are not reported in such a way as to make it possible to distinguish between data collected relating to merger references or monopoly references. It is unlikely that such sampling and reporting can do more than reflect a brief snapshot of a complex process.

However, the work is relevant to this study in as much as respondents were questioned about:

- their experience and views on the way that the OFT and MMC undertake investigations;
- the time and effort required in the investigation;
- their attitudes towards reforming the system.

The last of these areas has been only tangential to this study, but the first two lie at the heart of the work.

<sup>9</sup> A further study, *The Effectiveness of Undertakings in the Bus Industry* (National Economic Research Associates, 1997) was published towards the end of the research period. This made brief reference at para 4.2.3 to 'cost of the investigations and compliance costs'. The relevant paragraph is as follows: 'Current procedures impose two types of cost on the companies and regulatory agencies. First, there is the initial cost associated with the inquiry process itself. Given the current system of lengthy



the largest empirical study conducted of antitrust efficacy in relation to specific industries or cases is that of Whitney (1958). This is an exhaustive study of the effects of antitrust actions on 20 American industries which draws extensively from industry analyses and statistical economic data. However, while useful comparisons may be drawn between experiences in America and in the UK the nature of enforcement considered by Whitney, which includes instances of radical restructuring of industries and heavy damages payments, coupled to the scale of the work, makes it unsuitable as a model for the current project. The work of Vaughan (1983), however, has been influential – her study, based largely on ex-post interviews of corporate personnel, is of the dynamics of one US anti-trust investigation into pricing in the pharmaceuticals industry, and of the strategy adopted by the firm to respond to the investigation. The 1997 NERA research paper prepared for the OFT also draws attention to the difficulty of producing accurate quantitative data in this area. While their work has a different focus to that presented here the approach is similar:

‘Given constraints on both the availability of confidential data and of resources, we have assessed effectiveness by ... evaluating the views of market participants and by observing market outcomes ...’ (National Economic Research Associates, 1997, para 4.1).

## CHAPTER-SPECIFIC APPROACHES

### *Chapter 5 (United Automobile Services)*

The OFT report into the behaviour of United Automobile Services (OFT, 1995c) was the last report to be published under the provisions of s 2 of the 1980 Competition Act<sup>9</sup> and was the first report to be published by either the OFT or the MMC that fell within the relevant time frame of this research. The report was selected as the basis for the first study in part on this basis of timeliness, but also because its narrow scope (being concerned with the activities of three companies in a narrowly-defined market – buses – in a specifically defined area – Darlington). Matters were simplified further by the fact that one of the three companies had been wound-up shortly after the conclusion of the investigation, and, on the OFT’s own estimation, had not devoted any resources or effort to participation in the inquiry. Given the small number of parties, and the lack of models on which to base a questionnaire it was felt that it would be appropriate to conduct interviews with the two primary parties, and with the OFT case officer. During the course of the interviews it became clear that the experience and approach of the parties was so diverse as to make it difficult to construct a questionnaire that would be of use in future studies, and the decision was taken at the conclusion of this study to retain the interview format for key parties in later studies. Only five other parties had approached the OFT with their views, and these were contacted by way of letter for the sake of completeness. Following comments made by the OFT case officer as to the precedential value of OFT reports a questionnaire survey was conducted of bus firms in an attempt to determine whether the report in this instance may have had effects that extended beyond the immediate situation. Some 125 questionnaires were sent to

<sup>9</sup> *Cont.* “publishable” investigations by the OFT and MMC, this can be considerable. North East Buses estimated that the OFT/MMC investigation had imposed costs of £200,000 on the company, in the form of staff time and the cost of external advisers’. No further detail is provided beyond this single estimate, although the figure is consistent with those suggested by the case studies in this work, those costs related to a merger investigation, and not to anti-competitive conduct.

<sup>10</sup> While the OFT retained jurisdiction in this area the requirement to conduct a formal inquiry and publish a report were removed by provisions of the Deregulation and Contracting Out Act 1994 (see the Annex for a fuller discussion of the competition law regime at the time of the work).



bus firms listed in *The Little Red Book 1995/96*, the leading industry directory, being 13.1% of the firms listed. A response rate of 42.4% was obtained. The results of that survey are reported in detail in Chapter 5.

### *Chapter 6 (Classified Directory Advertising Services)*

In its report into classified directory advertising services (MMC, 1996c) the MMC considered the actions of a scale monopolist, Yellow Pages, and this was the first report for which the MMC was able to give details of the costs it incurred in the investigation. The emphasis on one firm facilitated the investigation of the industry participation, and another primary purpose of this study was to gauge the impact of the investigation on third parties making submissions to the MMC by way of questionnaire (a decision was made that the experience of these third parties would be sufficiently similar to justify the use of questionnaires rather than interviews, and this appears to be supported by the responses). All of those who gave evidence to the MMC, or who made their views known are listed in the published report, and they formed the total population. However, the sample was limited to those for whom a contact address could be found.<sup>11</sup> Unfortunately the main competitor to Yellow Pages, Thomson, was involved in an acrimonious management buy-out at the time of the study, and the executives who headed the company's response to the inquiry were not available to comment on the report or on the consequences of the undertakings subsequently negotiated. Further interviews were carried out with a selection of parties who, on the basis of the returned questionnaire, were identified as being likely to be significantly affected by the outcome of the report.

### *Chapter 7 (Foreign package holidays)*

Three monopoly inquiries were launched during the relevant time period of this work. Inquiries into residential estate agency services in Scotland, and into the supply of electrical goods were likely to (and have subsequently been shown to) involve thousands of parties,<sup>12</sup> and the scale of the investigations raised concerns as to whether the MMC report would be published in the relevant time period. The third investigation, into aspects of the travel industry (launched on 7 November 1996), considered a relatively concentrated industry and the report was published on schedule at the end of 1997. Accordingly this was selected as the third specific case study.<sup>13</sup> Interviews, which had been shown to provide useful results in the earlier two investigations, were again the main method of collecting data from the major industry participants, and by contacting companies at the outset of the inquiry, instead of waiting until the report had been published, it was possible to be given views and responses that were not tempered by a consideration of the report's conclusions. Each of the main parties was interviewed on two occasions: during the investigation itself, and subsequent to the report's conclusions being made public. Views were also sought from those who had pressed most strongly for the MMC to consider the market: the Consumers' Association and the Association of Independent Travel Operators. The primary purposes of the interviews were to determine the following matters:

<sup>11</sup> The identification of parties in MMC reports is not a straightforward matter. The details supplied will often be only a company name, and the MMC itself is not able to give out further details of the addresses of those involved in its investigations.

<sup>12</sup> The MMC believe that around 7,000 parties have been involved in the electrical goods investigations.

<sup>13</sup> The selection of this case also meant that this study will have encompassed references under the Competition Act, and both scale and complex monopoly references under the Fair Trading Act.



- the strategy adopted by those involved in the investigation to manage the investigation;
- the costs of responding to the investigation, or of making submissions to the investigation;
- the factors that were responsible for the adoption of the management strategy (in particular the perceived threat posed by the investigation), or, in the case of parties not subject to the investigation the factors that had motivated their involvement; and
- the response of the parties to the report's conclusions and the subsequent impact the result would likely have on the industry.

Work carried out for Chapters 5 and 6 had already demonstrated the limited nature of the involvement of other third parties, and these were not contacted again in this study.

### *Chapter 8 (repeat users)*

The three case studies, whilst tending to produce results that were consistent across the studies, represent a small part of the work of the OFT and MMC in investigating and recommending action against monopoly conduct over the years for which the regime has been in place. In Chapter 8 a wider survey was carried out of others who have been involved in the system. For this chapter the focus was on those who have been involved repeatedly with the system, other than as companies subject to investigation. A study of this group would help demonstrate the extent to which the results obtained in the three case studies were consistent with wider experience. Lawyers, and other professional advisors who were identified as having been involved in assisting companies in the conduct of investigations, were contacted. Twelve interviews were held with leading competition law firms, and for this group a standard set of interview questions was constructed:

- 1 What experience have you had in relation to s 2(1) of the CA, or public interest FTA hearings?
- 2 What would be the procedure followed through a typical case?
- 3 Would you become involved at the stage of the initial OFT interest?
- 4 If involved early how much effort will be put into persuading the OFT that there is no need to refer a matter to the MMC?
- 5 To what extent would you be involved in co-ordinating the company's submission, or would you be providing one aspect of a package of advice?
- 6 Would you automatically go to outside consultants for economic advice?
- 7 What do you think is the attitude of clients to the procedures?
- 8 What is the outcome that clients fear most?
- 9 Do you think that the procedure is one that gives value for money?
- 10 Are there any facets of the law which make the job harder than it should be? If so, how would you remedy these?
- 11 How easy is it, on the basis of previous experience, reports etc to advise the client as to the likely outcome?
- 12 Can you say what the legal fees might be for a typical monopoly inquiry?
- 13 Is this an area in which clients come back to you?
- 14 Have any clients approached you to assist in compliance issues where there has been no threat of investigation?
- 15 Are you ever approached by clients who wish to use competition law as a solution to commercial problems? If so what advice would you give them?

This schema was not rigidly adhered to, but formed a structured template for the interviews of professional advisors. Questions were sent to respondents prior to the interview taking place from the second interview onwards at the suggestion of that respondent who had participated in

other research projects in the past. While some respondents were grateful for this the majority admitted at the outset of the interview that they had not had time to consider the issues in any detail specifically for the interview, although all dealt with matters that lay within their regular expertise. As might be expected in a concentrated market there was a strong degree of consistency in the answers given, although the decision was taken to continue with each interview in full for the sake of consistency and to test the reliability of the data collected. The twelve interviews held (which included nearly all the major law firms working in this area) are quoted from extensively in Chapter 8, although in anonymous format.

The three main providers of economic consulting agreed to be interviewed, and the questions asked of them are as follows:

- 1 What level of involvement has your firm had in the areas of the UK Competition Act and monopoly investigations under the FTA?
- 2 How would you typically become involved in an investigation and at what stage of the process?
- 3 What tasks would you be performing in relation to specific cases, and why would companies not be able to perform these themselves?
- 4 What are the particular things that are being asked of you by the agencies?
- 5 Do you feel that the correct questions are being asked?
- 6 Does your approach vary depending on the agency that you are putting the material to?
- 7 What are your views as to the quality of analysis conducted by the OFT and the MMC?
- 8 What might the fees typically be in standard cases?
- 9 Do you compete with lawyers for fees, or offer a complementary service?
- 10 Are there any other issues that you would like to raise?

The consistency of answers provided by this small group was very strong, but as all will come into regular contact professionally it is likely that they will have voiced and discussed similar concerns amongst themselves often.

The subject matter to which this methodology is applied is considered in the following chapter.



# Chapter three — The Economic and Regulatory Framework: Benefits and Costs of Competition Policy Generally

## INTRODUCTION

This research project has as its focus aspects of the procedural approach to the control of monopoly anti-competitive conduct in the United Kingdom and the assessment of the public interest test. However, the framework within which this procedure is implemented is important if one is to begin to be able to assess the procedure's efficacy. Thus, for example, an efficient procedure will more likely lead to the attainment of one of the substantive benefits that are claimed for competition policy. A procedure that is generally regarded to be effective may reduce the overall incidence of anti-competitive conduct in the economy and again lead to benefits as a result. This chapter reviews the claims that have been advanced to support the application of competition policy, and considers also some of the general and specific costs that are associated with competition law.

In its examination of the UK policy on monopolies<sup>1</sup> the Trade and Industry Select Committee was keen to emphasise that it was considering both the costs and the benefits of the operation of the regime. In practice, however, the greatest emphasis was laid on costs, which were often taken to be synonymous with, or arising directly out of, perceived failings in the regime, and the burdens imposed by its operation. These costs are considered later in this chapter. The benefits that flow from the application of competition law tended to be assumed or discussed in generalities. This is a problem that confronts most of those who seek to explain or understand this area of regulation. In his study of the UK regime prior to the enactment of the 1973 Fair Trading Act, Hunter noted that:

'To identify the specific policy objectives of legislation which purports to maintain or restore competition is not easy. More than most this area of political economy attracts an unusual mixture of sentiment, reformist doctrine and fundamental questions of economic organisation. To proceed, it is convenient, and logical, to separate two broad categories of objective: (i) political objectives or value judgments associated with maintaining a competitive system; and (ii) the economic-efficiency objectives' (1966, 17).

Some understanding and classification of the costs and benefits arising, or allegedly arising, out of the operation of the regulation of competition in a free market or mixed economy if the efficacy of that regime is to be examined, and if, in a regulatory system, choices are to be made

---

<sup>1</sup> (HC 249, 1995). Note that 'lawyers and economists use the word *monopoly* (and therefore the word *competition*) in distinctly different ways. For lawyers, the term *monopoly* is used as a "standard of evaluation", designating a situation not in the public interest. *Competition*, in comparison, designates situations in the public interest...To an economist, the distinction between monopoly and pure competition is the differing ways in which market transactions occur and resources are allocated' (Hirsch, W *Law and Economics: An introductory analysis* 2nd edn, quoted in Frazer and Waterson (1994, 7). In this chapter, unless the context indicates otherwise, the words 'monopoly' and 'competition' are to be given the meanings that would be ascribed to them by an economist.



as to which cases are to be pursued. Kaysen and Turner, for example, divided the aims against which competition policy may be tested into four broad classes:

‘the attainment of desirable economic performance by individual firms and ultimately by the economy as a whole; the achievement and maintenance of competitive processes in the market-regulated sector of the economy as an end in itself; the prescription of a standard of business conduct, a code of fair competition; and the prevention of undue growth of big business, viewed broadly in terms of the distribution of power in the society at large’ (1959, 11).

Morrison, et al (1996), concentrate on ‘three types of detriment that are reasonably open to quantification: dead-weight loss, wasteful spending and inefficiency.’ However, the authors recognise that ‘there are other, less easily quantifiable, benefits from competition inquiries’ (1996, para 1.14). When these are taken into account it becomes clear that estimates as to the efficacy of competition law based purely upon the criteria identified in that unpublished research paper will be an understatement of the true benefits that flow from any competition policy.

The first part of this chapter introduces the various claims that have been and are now made for the benefits that flow from antitrust. The extent to which these benefits may be measurable, or have been measured is also considered. The basic questions to be asked of any competition regime are the same. These are (1) which economic model forms the basis for the use of economics; and (2) what, if any, combination of other goals is incorporated in the policy alongside this economic model? It is not the purpose of this work to question the legitimacy of the various goals set forth by the legislators, although questions as to the ability of the tool to meet the goals of the policy will of necessity be addressed. The economic literature in this area is extensive, and it is beyond the scope of this work to reproduce in full arguments made relating to specific practices that are alleged to be anti-competitive. Such arguments are dealt with further in Chapter four, which deals with some of the instances in which conduct has been condemned under the domestic regime.

## BENEFITS FLOWING FROM COMPETITION POLICY

### *The economic framework*

In as much as industrial economics is a positive, as opposed to normative, science the economic debate is dealt with here in isolation from wider political circumstances. The selection of these arguments and the ways in which they have been exploited by rule-makers and rule-enforcers is considered separately below.

### Neo-classical economics

Neo-classical economics developed towards the end of the 19th century. Leon Walras founded the general equilibrium theory, and Alfred Marshall the partial equilibrium variant. Standard economic texts (such as Lispey, 1989) focus on the extreme models of perfect competition and monopoly, with monopolistic, or imperfect, competition displaying some of the characteristics of both extremes. It is clear that:

‘the perfect competition model has had a powerful background influence upon the formation and the enforcement of competition policy, most clearly so in North America but also in Western Europe and the United Kingdom’ (Burton, J. ‘Competition over Competition Analysis’, quoted in Lonbay, 1994, 4).



Under neo-classical theories an economy characterised by perfect competition in all markets will achieve, given certain assumptions such as the absence of economies of scale, a pareto optimum solution. In a monopoly market this theory suggests that price is raised above marginal cost of production, output is restricted and there is a flow of welfare from the consumer to the monopolist.<sup>2</sup> Neither model can be regarded as a realistic explanation of observed markets. The major deficiency in each is that the analysis is static, taking no account of the sustainability of the market conditions.<sup>3</sup> Empirical observation suggests, in particular, that monopolies, even where they do exist, are unable to remain monopolies in the long run unless they are protected by legislative barriers to entry (e.g., regulatory controls or intellectual property rights). The definition of competition more usually accepted by regulatory authorities<sup>4</sup> is that of Clark's 'workable competition' (1940), which 'recognises that monopoly elements are inevitably present in most market situations in modern industry and it seeks the ways in which these can be made compatible with active competitive behaviour' (Allen, 1968, 23). Although key elements in the microeconomic analysis form the foundation of contemporary analysis the response to the perceived failings of neo-classical analysis has led to a divergence in current schools of economic thought. This divergence is of the greatest import in relation to the policy proposals made by the respective schools of thought (see below), although more recent developments in economic modelling are reducing the scope for divergence in this respect.

#### PRINCIPLES OF INDUSTRIAL ECONOMICS, AND MONOPOLY MARKETS

A monopolist is 'a seller ... who can change the price at which his product will sell in the market by changing the quantity that he sells' (Posner, 1976, 8). The extent to which a reduction in supply by any one producer will affect price will depend on (1) the price elasticity of demand of the product in question, and (2) the ability of other producers to compensate for the reduction in supply by increasing their output. The more price inelastic the demand and the greater the relative power of the monopolist the greater is the ability of the monopolist to 'make the price' rather than to 'take the price'. This much is accepted by nearly all. The question to be resolved is that of the cost to society of the monopolist's reduction in output and increase in price.

One such cost has been labelled the 'dead-weight welfare loss'. This is the difference between the total sum of demand satisfied under perfect competition and under monopolistic competition (Harberger, 1954. And see the diagram below). It is a loss of consumer surplus that is *not* offset by a gain in the welfare of the monopolist:

The argument was first made by Harberger, who attempted to 'get some quantitative notion of the allocative and welfare effects of monopoly' (1954, 77). Recognising that any answer produced could be at best an approximation<sup>5</sup> Harberger worked from the accepted 'operating hypothesis'

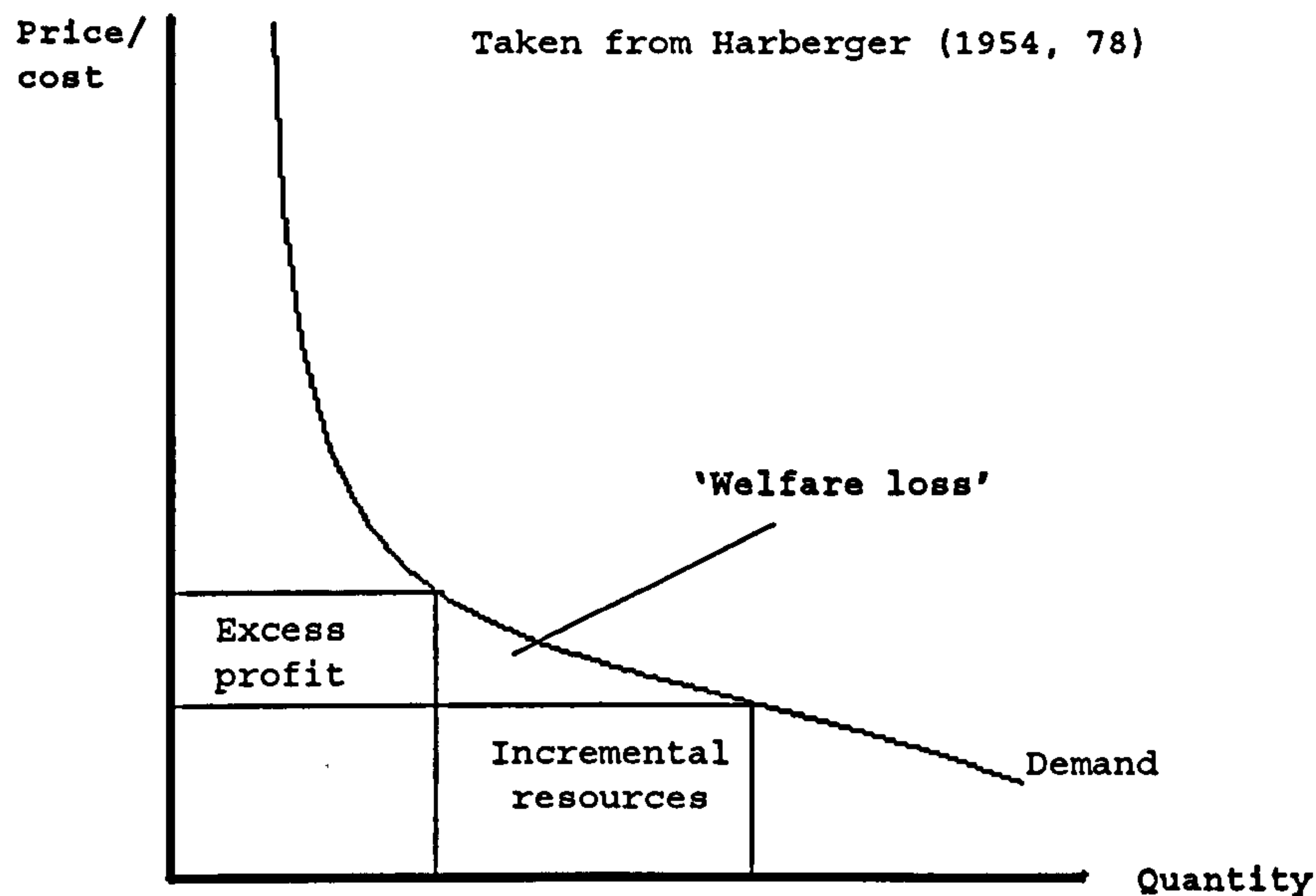
<sup>2</sup> See e.g. Martin (1994, 27): 'Monopoly is undesirable because a monopolist will restrict output and charge more for the product than the opportunity cost of the resources used'.

<sup>3</sup> See e.g. Allen (1968, 16–17): 'Whatever the usefulness of this theory in enlarging our understanding of the problem of resource allocation, it is scarcely relevant to the study of the actual behaviour of monopolists and of the policies pursued by governments in regard to them. This is mainly because of the restricted meaning given by these theorists to the term "competition", which stultifies a realistic examination of the economic situation, and partly to their neglect of some of the chief factors in economic efficiency, especially innovation and the forces that promote it. The approach does not carry us far in our efforts to explain the organization of industries and the behaviour of firms in the constantly changing environment of a modern economy. Still less does it help in the framing of public policy towards that organization and behaviour.'

<sup>4</sup> See e.g. the definition adopted by the ECJ in Case 26/76 *Metro-SB-Grossmarkte GmbH & Co KG v Commission* [1977] ECR 1875, discussed below.

<sup>5</sup> 'The best we can hope for is to get a feeling for the general orders of magnitude that are involved' (1954, 77).





that, in the long term, resources would be allocated amongst all competing industries in such a way as to yield constant returns. In such a situation long-run average costs would be close to constant, and marginal costs and average costs would be the same. Price theory suggests that the 'malallocative effects of monopoly stem from the difference between marginal cost and price' (1954, 77), which is to say the additional profit taken by the monopolist as opposed to the like firm operating in a perfectly competitive environment. Basing his analysis on data collected relating to American manufacturing output from 1924-28, a period of relative price stability and industrial continuity, Harberger calculated the average rate of profit obtained in each industry and the divergence of this from the rate of profit for all manufacturing industry. From this, and making necessarily broad assumptions as to unitary elasticities of demand, it was calculated that, in order to expand output so as to reduce industry-specific profits to average profits, a transfer of some \$1.2 billion (approximately 4% of the manufacturing industry's resources, or 1½% of economy's resources) was required. The next step was to estimate the consequences of this transfer on consumer welfare ('how much would people be better off?'). On the basis of his figures Harberger obtained 'an estimate of by how much consumer welfare would have improved if resources had been optimally allocated throughout American manufacturing in the late twenties. The answer is 59 million dollars – less than one-tenth of 1 per cent of the national income' (1954, 82).<sup>6</sup> Responding to the paper Ruth Mack made clear both its importance and its limitations:

'The calculations indicate that if monopoly is identified by excess profits and elasticity of demand is no greater than one, the redistributive welfare effects of monopoly are negligible even if we pick out of a hat, or out of Harberger-Epstein,<sup>7</sup> an extremely high estimate of the proportion of manufacturing profits that are due to monopoly. This could hardly be otherwise since even total profits constitute only a small proportion of national income.

The most serious quarrel with the paper involves what is not in it rather than what is' (Harberger, 1954, 89).

<sup>6</sup> Further qualifications made in his analysis reduced that figure still further, to about one-thirteenth of one per cent. This result surprised Harberger: 'I must confess that I was amazed at this result. I never really tried to quantify my notions of what monopoly misallocations amounted to, and I doubt that many other people have. Still, it seems to me that our literature of the last twenty or so years reflects a general belief that monopoly distortions to our resources structure are much greater than they seem in fact to be.' (1954, 86.)

<sup>7</sup> Harberger's data was drawn from RC Epstein's study *Industrial Profits in the United States* (National Bureau of Economic Research, 1934).



Results following Harberger 'firmly established as part of the conventional wisdom the idea that welfare losses from monopolists are insignificant (Cowling and Mueller, 1978, 727), although more recently both Harberger's results and his methods have been subject to criticism. In particular, it has been pointed out that working from a mean industry profit and calculating welfare loss on the basis of variations from this mean automatically discounts as a welfare loss the monopolistic profits that are likely to be the industry norm and results in a substantial understatement of the true welfare loss (see e.g., Cowling and Mueller, 1978; Sawyer, 1980). While Bergson (1973) advanced the work of Harberger in developing a model based on a general equilibrium approach, compared to the partial equilibrium adopted by Harberger, his results 'are not derived from actual data, but are illustrative calculations derived from assumptions' (Sawyer, 1980, 335). Further, Kay who has developed a more general framework than that of Bergson is critical of Bergson's approach.<sup>8</sup> Diamond and McFadden (1974) added the 'expenditure function approach' to the range of tools, which also was based on general, rather than partial, equilibrium modelling. More recent studies based on a variety of these approaches, and using Harberger's framework but with modifications, suggest that Harberger's estimate is an understatement and may be seen as a lower bound. Figures of between 4% to 20% have been suggested in various studies: Cowling and Mueller (1978) suggest a figure of between 3.9% and 7.2% of GCP and Sawyer (1980) a figure of from 4½ % to 11½ % of net output.<sup>9</sup>

Eckard (1988) rejects altogether the view that the ratio of industry concentration (which may serve as a proxy for monopoly power) serves as evidence of reduced consumer welfare, and found 'no support for the hypothesis that ... concentration increase reduces consumer welfare' (1988, 340). Eckard argues that 'consumers benefit from lower prices and increased output [which] clearly are more direct measures of consumer welfare than industrial concentration', and in a study based on advertising behaviour found no link between concentration and higher prices. In *United States v Rockord Memorial Corp.* (898 F.2d 1278 (7th Cir. 1990)) Posner lamented<sup>10</sup> the lack of empirical evidence from industrial economists to establish a link between concentration and higher prices. The empirical work collated by Weiss (1989) and modelling set out by Scherer and Ross (1990) have been advanced, amongst other works, as a rebuttal to Posner (Thompson, 1996), and Eckard's conclusions are not widely supported.

<sup>8</sup> See Kay (1983, 317): 'what monopoly power enables firms to do is to earn profits by setting product prices which are high relative to factor prices. Since there are effectively no factors in Bergson's model, the central feature of monopoly is simply left out of the account'. Kay is concerned that Harberger has been misunderstood (at 330–331):

'Stigler has commented acerbically that if one believed Harberger's estimates economists would do better to fight termites than monopoly\*. This paper has shown that summed partial equilibrium results such as Harberger's are seriously misleading, and has described a not necessarily less tractable general equilibrium framework. More fundamentally, however, Harberger's calculations do not claim to answer Stigler's implied question. The bounds within which monopoly welfare losses lie are very wide, depending on the extent of actual monopoly power; and if that is so then there is sufficient rationale for anti-trust policies. ... If monopoly welfare losses are indeed small, then the proper conclusion is not that resource misallocation matters little but that real economies are quite close to the competitive ideal. This was the conclusion of Harberger's initial article; it was not the one which his successors and commentators pursued'.

\* In 'The Statistics of Monopoly and Merger', (1956) 64 Jnl of Political Economy 32 at 33.

<sup>9</sup> Sawyer, however, qualifies his result: 'one cannot easily talk of the losses from monopoly since the costs are arising from competition; competition amongst firms for a monopoly position. This type of competition is not taking place in an atomistically competitive framework, but in a monopolistic one' (Sawyer, 1980, 352). See also Morrison et al, 1996, Para 3.4 and the references cited therein. Scherer is sufficiently dismissive of the magnitudes of welfare loss represented by the Harberger triangle to 'dismiss allocative efficiency' as a basis for antitrust (1987, 1002).

<sup>10</sup> This has become known generally as 'the Posner lament' and has been vigorously responded to by economists, see e.g. Demsetz et al (1991).



An ancillary argument is that a concentrated industry is necessarily one in which barriers to entry are raised – and that size by itself inures an incumbent from the threat of significant competition. Kaplan (1954) questioned this assumption, and on the basis of a statistical investigation of industrial concentration in the United States suggested that: ‘evidences of mobility of position among the 100 largest industrials do not accord with any general assumption that large-scale corporations enjoy secure entrenchment by virtues of their size’ (at 142). Stigler (1956) is unconvinced by Kaplan’s evidence, pointing out that the turnover in top 100 companies is only around 1.5% per annum (thus leading to the conclusion that once a company is in the top 100 it is likely to be there for 100 years).

Whether the *transfer of wealth* from the consumer to the monopolist is also to be considered a *cost* depends very much upon the sort of value judgment that is eschewed by positive economics (or, strictly speaking, economists).<sup>11</sup> Scherer (1987, 998) is elegant:

‘In the standard analysis of efficiency, this redistribution is of no concern. It merely reflects a robbing of Peter (the consumer) to pay Paul (the producer), and since Paul might be more deserving than Peter, who knows whether society is worse off as a consequence?’<sup>12</sup>

A related cost of monopoly activity is that it results in a non-optimal allocation of resources, by sending the ‘wrong’ signals as to the value/cost of products.<sup>13</sup>

Yet another cost is that of the strategic activity undertaken to achieve, or reinforce, the monopoly position (rent seeking).<sup>14</sup> As is made clear in the OFT Research Paper:

‘The existence of, or potential for, supra-normal profits encourages firms’ managers to devote resources to obtaining or preserving market power. Firms may attempt to drive existing rivals out of the market or raise strategic barriers to entry, for example through excessive spending on advertising, building excess capacity, filing patents, or developing a large product range. As a result, their costs rise, reducing the profit that would have been transferred to firms’ owners’ (Morrison et al, 1996, para 2.12).<sup>15</sup>

11 See, e.g. Harberger (1971, 785) ‘any program or project that is subjected to applied welfare-economic analysis is likely to have characteristics upon which the economist as such is not professionally qualified to pronounce, and about which one economist is not professionally qualified to check the opinion of another. These caveats – which surely include the income-distributional ... aspects of any project or program ... may be exceedingly important, perhaps even the dominant factors governing any policy decision, but they are not a part of that package of expertise that distinguishes the professional economist from the rest of humanity.’

12 Of those who argue that ‘antitrust *should* be concerned with wealth redistribution, not just with deadweight loss triangles’ Scherer notes that this ‘is a sufficiently unfashionable view that I put it to one side’ (Scherer, 1987, 999).

13 See Martin (1994, 29): ‘By restricting its output and raising the price, the monopolist sends a false signal about relative value to the consumer. The consumer reacts optimally, from a private point of view, to this false signal and reduces consumption of the monopolized good. This reduction creates a misallocation of resources among industries. Not enough of the monopolized good is produced, from a social point of view, and too much of other goods is produced. It is this resource misallocation that produces the welfare-reducing and income-redistributing effects of market power.’

14 ‘[A] firm may pursue a variety of strategies to gain a position of market power. The costs of such strategies reduce social welfare; they are a cost of monopoly not captured in the deadweight loss measure’ (Martin, 1994, 31).

15 See too Scherer, (1987, 1000), and Cowling and Mueller (1978, 732–733): ‘[t]he existence of monopoly power in product markets attracts resources to its acquisition and protection, which are part of the social cost of monopoly apart from the distortions in output accompanying it. ... These costs could take the form of investment in excess production capacity, excessive accumulation of advertising goodwill stocks, and excessive product differentiation through R&D. Efforts to obtain tariff protection, patent protection and other types of preferential government treatment through campaign contributions, lobbying or bribery are parts of the social costs of monopoly’.



Although rent seeking is but a specific instance of profit seeking it has a specific application to situations in which government plays a role in the markets. The term 'is designed to describe behaviour in institutional settings where individual efforts to maximise value generate social waste rather than social surplus' (Buchanan, 1980, 4). A question considered in Chapter 5 is that of the extent to which the domestic regime encourages and deals with rent seeking in the bringing of wasteful competition-law based actions.<sup>16</sup> The omission of the costs of attempts to acquire monopoly from the Harbergerian derived estimates of welfare loss have been seen as further weakening the results produced by Harberger (Cowling and Mueller, 1978, 728). The same authors accepted in a later paper that there is 'no substantial body of systematic evidence to which to refer' in assessing the relative size of non-price benefits of monopoly activity which must be weighed against any price/quantity costs imposed (Cowling and Mueller, 1981, 723).

It is also widely argued that competition is a stimulus to cost and technical efficiency (sometimes called X-efficiency<sup>17</sup>), and 'the preponderant conclusion of numerous narrowly focused studies has been that X-inefficiency is more likely, or of a greater magnitude, when competitive constraints are weakest (Scherer, 1987, 1004).<sup>18</sup> While it does not have this as its primary aim, competition policy may, therefore, save firms from the consequences of their own misguided actions in situations in which they may be tempted into following a course of action in the name of competition that is not an efficient one.<sup>19</sup>

#### THE POLICY 'SCHOOLS'<sup>20</sup>

Economists and competition lawyers have over time drawn different conclusions as to the policy implications of these micro-economic arguments. The first major school of thought to develop emerged at Harvard University when, in the 1930's, researchers conducted analyses of specific industries. Their conclusions led to the Structure-Conduct-Performance model (SCP). The consequences of this for competition law were heightened by the work of Bain, and in particular his analysis of the effects of barriers to entry, and the definition thereof.<sup>21</sup> The work of Kaysen and Turner (1959) was also influential. Having set out the alternative goals of antitrust Kaysen and Turner proposed 'that the primary goal of antitrust be the limitation of market power' suggesting that 'where market power exists and can be reduced without sacrifices in performance, then such action is desirable without reference to the question of how good over-all performance may have been' (1959, 45).

It has been argued since that '[t]his sixties concern with the presumed market power of large American Corporations ... was, in retrospect, very much the offspring of its time and the associated climate of intellectual opinion' (Burton, in Lonbay, 1994, 9).

<sup>16</sup> This factor is also considered further below.

<sup>17</sup> Which may be defined as 'the efficiency with which inputs are combined to produce a given output' (Liesner and Glynn, 1987, 351).

<sup>18</sup> See, e.g. Morrison et al (1996) at paras 2.16-2.21 and the references there cited.

<sup>19</sup> Many companies may be persuaded to follow the fundamental strategy, although not all of the tactics, of Don Vito Corleone, aka the Godfather: 'Like many businessmen of genius he learned that free competition was wasteful, monopoly efficient. And so he simply set about achieving that efficient monopoly (Puzo, 1969, bk 3, ch 14).

<sup>20</sup> In 1979 Posner argued that 'it is no longer worth talking about different schools of academic analysis' (1979, 925). However, for the sake of completeness, and because the terms are still widely used, a brief description of the main trends is given here.

<sup>21</sup> See Bain (1956). Bain's 'investigation was made because of two beliefs: (1) that most analyses of how business competition works and what makes it work have given little emphasis to the force of the potential or threatened competition of possible new competitors, placing a disproportionate emphasis on competition among firms already established in any industry; (2) that so far as economists have recognised the *possible* importance of this "condition of entry," they have no very good idea of how important it actually is' (1956, 1).



One of the first practices that the Chicago school,<sup>22</sup> and notably Stigler, examined, was that of the use and existence of barriers to entry. Not only was the existence of such barriers debated with Stigler's definition of a barrier to entry as an *additional* cost to be borne *only* by an entrant into an industry, being more restrictive than that of Bain<sup>23</sup> but so too were the welfare implications of their existence. Where the Harvard economists had argued that higher barriers enabled incumbents to increase prices progressively further above marginal costs, and were therefore *prima facie* to be condemned, the Chicagoans are concerned to examine the nature of the barrier, tolerating those which are the result of efficiency considerations. Thus Bork has argued that: '[t]he question for antitrust is whether there exist artificial entry barriers. These must be barriers which are not forms of superior efficiency and which yet prevent the forces of the market ... from operating to erode market positions not based on efficiency' (1993, 311). More generally it is the tendency of the Chicago school to take 'the view that the classroom model of perfect competition can be used to explain most business behaviour' (Martin, 1994, 537). Alongside this sits the general assumption of the school that "non-economic goals" [have no] place in the application of competition policy, both because of their non-quantifiable nature, and because of the desirability of promoting efficiency as the sole goal' (Frazer, 1990, 609).

Another key difference between the schools is that the SCP Harvard model is replaced by one in which performance dictates market structure, the 'reverse causation' argument. This flows from the work of, *inter alia*, Demsetz and Peltzman. The Chicagoans do not deny that antitrust policy has a role to play. Posner, for example, concludes that 'monopolization can impose on society costs that are very substantial in relation to the output of the monopolized market' and that '[t]hese costs are the economic basis of antitrust policy' (Posner, 1976, 255).

The Chicagoan assumption that real-world behaviour will tend to match that forecasted by the perfect competition model has now been challenged with the emergence of the new industrial economics, which is informed in part by the empirical evidence provided in various antitrust actions.<sup>24</sup> The better view now is that:

'[a] profit-maximising firm in an oligopolistic industry will engage in strategic behaviour to acquire and maintain market power, provided that the expected profit to be gained from such behaviour exceeds its cost. Part of the incentive for a manufacturer to integrate backward and take control of input supplies is to raise entry costs. Part of the incentive for a manufacturer to integrate forward into distribution or to impose vertical restraints on distributors is to raise entry costs. Under conditions of imperfect information, an occasional episode of predatory behaviour allows a dominant firm to establish a reputation that will discourage future entry...

In imperfectly competitive markets, profit-maximising firms are able to engage in strategic behaviour to increase their own profits by restricting the opportunities of rivals. *In the absence of a competition policy that makes the expected cost of strategic behaviour sufficiently great, strategic behaviour will occur in equilibrium in imperfectly competitive markets*' (Martin, 1994, 538. Emphasis in original).

<sup>22</sup> The emergence of which has been chronicled by Bork (1993, xi–xii).

<sup>23</sup> For Bain '[f]or easy entry, three conditions must in general be simultaneously fulfilled. At any stage in the relevant progression of entry (1) *established firms have no absolute cost advantages* over potential entrant firms; (2) *established firms have no product differentiation advantages* over potential entrant firms; and (3) *economies of large-scale firms are negligible*, in the sense that the output of a firm of optimal (lowest-cost) scale is an insignificant fraction of total industry output' (1956, 12, emphasis in original). Faced with these conditions 'entry tends to be deterred sufficiently so that established firms are probably enabled to elevate price at least somewhat above the lowest-cost level without inducing entry' (1956, 13).

<sup>24</sup> See e.g. Martin: 'Industrial economists now know that this competitive approximation assumption is incorrect, both in theory and in practice' (1994, 537).



Competition policy is, therefore, one means by which barrier-raising strategic behaviour may be deterred.

Focusing only on the Harvard/Chicago dichotomy Frazer argued that:

‘The choice between “Chicago or not” is not a choice between “economics or not”. The choice, rather, concerns the *appropriate* use of economics in the application of competition policy ... This may result in the efficiency model of Chicago being used exclusively, or in combination with other goals’ (1990, 620).<sup>25</sup>

And Posner argued nearly 20 years ago that

‘although there was a time when the “Chicago” school stood for a distinctive approach to antitrust policy, especially in regard to economic questions, and when other schools, particularly the “Harvard” school, could be discussed and contrasted with it, the distinction between these schools have greatly diminished’ (Posner, 1979, 925).

As Posner recognised there remain differences between the schools, particularly in relation to the consequences of concentration in industry. The following section attempts to establish, as far as is possible, what choices have been made, and how these have been adapted in response to various stimuli.

#### Legislative goals

Different regimes have emerged at different times and in response to different pressures:<sup>26</sup> the Sherman Act was enacted at a time when the industrial economics of the neo-classical school was still nascent; European Community law to serve explicit economic objectives; and UK law initially in response to concerns about employment. It should be recognised that rule-makers’ arguments will, necessarily, be more static than those of rule-enforcers. Legislative debates encapsulate political responses to economic theory at particular pressure points, and the issues are readdressed only when the pressure for reform becomes unassailable. Rule-enforcers on the other hand, responsible for ongoing policy implementation, are better able to respond to changes in both economic theory and market pressures as they occur.<sup>27</sup>

#### THE UNITED KINGDOM

Although the UK regime is in the process of changing in response to pressures placed on the legal system by the membership of the European Community, and its directly effective competition law, the broad basis for the contemporary policy addressed in this research is founded on the 1944 White Paper (Cmd 6527). The uncertainties prevalent at the time are clearly revealed in the investigative nature of the policy proposal:

‘Such agreements or combines *do not necessarily operate against the public interest*; but the power to do so is there. The Government will therefore seek power to inform themselves of the extent and effect of restrictive agreements’ (Cmd 6527, para 54, emphasis added).

Prior to the 1973 Act the Commission made clear that it would respond to the classic position in which the monopolist limits output and raises price. Thus, in the *Industrial and Medical Gases*

<sup>25</sup> Insert ‘or the new industrial economics’ after Chicago and the argument is brought up to date.

<sup>26</sup> Some of the early (and pre-) history of the domestic regime is set out in the Annex.

<sup>27</sup> In the American context see, e.g., Peritz (1996).



report the Commission accepted that a large market share would be advantageous to the holder of that share, which would be:

‘in a position to determine within wide limits the profit which it wishes to make, and it can then fix its prices in relation to costs at a level which will normally ensure to it the return which it desires. Even if the powers which such a monopoly possesses are at a given time exercised with moderation, the risk will always remain that at some time in the future it may use its position to make excessive profits at the expense of the consumer’ (Cunningham, 1974, 81).

Commenting on the Fair Trading Act, Cunningham (1974, 106) wrote that ‘the objectives of the policy are easy to discern. Where monopoly or dominant position exists, it is desirable to have the ability to prevent abuse of the economic power they give.’ The subsequent analysis however suggests that the Act does not, in fact, encapsulate clear goals or policy objectives,<sup>28</sup> and Cunningham recognised that ‘the true argument for competition policy, and competition law, may lie, not in the economic sphere, but in political and social considerations’ (1974, 107). In the 1973 Act the benefits of the policy are encapsulated in the section 84 ‘public interest’ test.<sup>29</sup> The Act gives indications of those matters that may be considered as against the public interest in as much as it refers to ‘the desirability of maintaining and promoting effective competition’ (s 84(1)(a)) but ‘taken as a whole they are . . . something of a mixture of means and ends’ (George and Joll, quoted in Frazer and Waterson, 1994, 6). Indeed the lack of clarity in domestic law was the central concern of the Trade and Industry Committee, which encapsulated the problem thus:

‘most importantly, a commonly cited difficulty with the [FTA] is the definition of the public interest. The DGFT defined the public interest as “consumer well-being” but admitted that “I do not think anybody could possibly pretend that they could sit down and do some sums and have an answer they can defend against all comers at the end of the day”. The Chairman of the MMC said that it was impossible to define the public interest in a general context, and the Minister simply referred to the criteria set out in the Act. These criteria, however, are extremely broad and lack an indication of priorities. As the Consumers’ Association pointed out, “with a little bit of creative analysis it is possible to define almost any industry situation as falling within one or other of those particular criteria”. Since the “public interest” judgment lies at the heart of UK policy on monopolies, this ambiguity is a matter of concern’ (HC 249–I, para 20).

That different bodies in the UK may place different emphases on the benefits that accrue from competition law is clear from past conduct. The unprecedented blocking of a Competition Act investigation into bus services on the Isle of Arran by the Minister is but the most obvious example of conflicts between the bodies charged with administering the law. It is likely that the Minister, more so than the DGFT or MMC, will consider most strongly non-quantifiable normative factors, and is given greater discretion to do so than is the OFT/DGFT or the MMC. In his evidence to the Committee Sir Bryan Carsberg expressed concern that ‘over the period [in question] there has been a slightly higher proportion of no findings on public interest than usual’ (HC 249–i, 131), and it is generally recognised that there have been tensions between the OFT and MMC regarding the outcome of various inquiries and a perceived ‘industry friendly’ approach taken by the MMC. A clear expression of the purposes of competition policy, resulting in a clear

28 Cunningham’s analysis of these objectives is disappointing. The economic debate is summed up thus: ‘In short, the competitive system, by allowing economic forces to work themselves out will, of itself, produce those results which the community, as a group of economic individuals, desires as indicated by how those individuals cast their economic “votes,” by exercising their purchasing power – a form of economic democracy’ (1974, 106).

29 For s 84 see the Annex.



hierarchy of the benefits expected to arise from its operation, would obviate much of the discussion.

The picture in the UK is complicated by the role that competition policy plays in relation to specific sectors. While the specific rules applying to the 'deregulated' utilities industries and to the media do not fall within the ambit of this work the FTA and the Competition Act apply to areas, such as transport, where the Acts must be read alongside, e.g., the Transport Acts, and where specific criteria are to be applied to the facts.

#### AMERICA

Thorelli concluded, in his classic examination of American antitrust policy (1954), that the tide of public opinion was, at the end of the 19th century, too strong to be ignored by American politicians. As Greenhut and Benson explain '[t]he primary source of this pressure was from farm groups which were subject to what they considered to be excessively high rail rates, as well as extremely high prices on manufactured goods' (1989, 169). It has been argued that, even before Congress responded, the courts had shown themselves able to deal with trusts.<sup>30</sup> The extent to which the 1890 Congress pursued a *coherent* policy has been questioned (see e.g. Hofstadter, R. 'What Happened to the Antitrust Movement?' in Sullivan, 1991), and was indeed questioned in that Congress.<sup>31</sup> Greenhut and Benson explain the enactment of the Sherman Act in terms of its reflection of special interests:

'The passage of the Sherman Act fits readily into the model of special interest legislation. It was understood clearly at the time that some antitrust action was being demanded by farmers, and that the passage of the Sherman Act was in response to that demand. The act was *never intended* to provide efficiency, and even the name antitrust gives away the fact that the law was intended as a transfer of property rights away from trusts. What else could antitrust mean?' (1989, 170, emphasis in original).

Economic arguments were not to the fore, and neither was economic knowledge:

30 The trusts were merely a point in the line of a progressively tighter chain of business association. At one end was the 'loose' association, which on occasion gave way to a more developed 'pool'. The trusts fell one step short of a full-scale merger, permitting tight control over the activities of the various components of the trust, eliminating any prospect of 'cheating' (Thorelli, 1954, 72–85). Kintner has demonstrated that court actions between 1890 and 1892 'were directly responsible for bringing the curtain down on the trustee device as a legitimate method of business combination' (Kintner, 1980, 110). Thorelli, however, suggests that the courts were not able to deal with the wide range of practices that attracted public condemnation (1954, 53):

'It must be remembered that, principally, [the common law doctrines] were applied by state, and not by federal, courts. There was no federal common law, at least not in this field. With the growing integration of the economic life of the nation this was bound to prove a serious handicap in the development of public policy regarding restraints on trade, since the growth of the common law was not entirely uniform in all the states.'

But there was at least one more serious weakness which was bound to make the common law an insufficient device in the conscious effort to maintain a workable degree of competition and safeguard a fair opportunity for the newcomer – gradually becoming an American policy – in an era increasingly characterized by mass production and big business. That was the lack of coordinated and aggressive public prosecution and, not least, the lack of adequate penalties. The vast majority of cases at common law were private suits between parties to restrictive agreements. That most courts were unwilling to enforce such agreements in restraint of trade no doubt deterred many businessmen from making them; it is equally clear that it did not deter a good many others.

The state of the common law at the end of the century demanded federal action.'

31 Senator Orville Platt summed up the debate as being 'not in the line of honest preparation of a bill to prohibit and punish trusts' and was rather 'to get some bill headed "A bill to punish trusts" with which to go to the country' (Sullivan, 1991, 22).



‘One may say with reasonable assurance that the confusion of Congress over the economic significance of antitrust mirrored a more general confusion in American society’ (Sullivan, 1991, 21).

Stigler (1982, 1) noted that contemporary economists were, by and large, indifferent to the enacting of antitrust legislation. This indifference continued well after the legislation took effect. Clark recognised that ‘none of [the support] came from professional economists’ (Clark, J.B. *The Federal Trust Policy* (1931) quoted in Greenhut and Benson, 1989, 171).<sup>32</sup> To the extent that economic goals did exist, they were based on the classical model of competition: maximum competition would result in maximum efficiency.

The general thrust of the policy has been characterised by Bain as being ‘generally to secure or preserve market structures conducive to workable competition, and also lines of market conduct by sellers or buyers having the same tendency’ (1956, 205). It must, however, be recognised that the specifics of policy change over time. What may have been the goal of US legislation in 1890 is unlikely to be the goal in 1980. Even over the presidential cycle it is clear that the *emphasis* of enforcement policy changes even if the underlying goals remain constant over such a short time. Neale (1970, 11) argues that ‘there is evidence that the aims and scope of antitrust policy have changed a good deal since the passage of the Sherman Act, and may easily change some more in the future’.

#### THE EUROPEAN COMMUNITY

Although the law of the European Community is not part of this study the Community approach has had a significant impact on the reshaping of domestic law which will, with the entry into force of the Competition Act 1998 on 1 March 2000 be largely aligned in all substantive respects with that of the EC.

In the EC, Korah (1986, 85) has written, ‘there is no agreement as to what objectives should be pursued by competition policy’. More accurately it might be argued that there is no agreement as to which of the various objectives of competition policy are to have *priority* at any given time. Certainly it is true that the aims of Community policy are nowhere encapsulated in its legislative provisions. A limited guidance may be obtained from the Treaty: article 3(g) speaks of the need to maintain ‘a system ensuring that competition in the internal market is not distorted’; article 85 emphasises that consumer interests are important given that agreements claiming an 85(3) exemption can do so only where consumers are allowed ‘a fair share of the resulting benefit’. This in itself is evidence of the fact that ‘Community competition policy *does not* serve the narrow goal of maximising the sum of consumers’ and producers’ surplus’ (Martin, 1994, 55. *Emphasis in original*). Frazer has suggested that this could permit the introduction of Lande’s wealth transfer model as a basis for EC policy (1990, 621). Article 86 is silent, save in its application to those situations in which there is an ‘abuse’.

The significant statements relating to the benefits to be conferred by the operation of Community law have come from the ECJ and the Commission. In *Metro-SB-Grossmarkte GmbH & Co KG v Commission* ([1977] ECR 1875, [1978] 2 CMLR 1) the ECJ held that:

‘The requirement contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition,

<sup>32</sup> Greenhut and Benson ask if: ‘Perhaps the statutes really were intended to promote competition and economic efficiency, and even if they were not, perhaps current enforcement of those same statutes reflects such a purpose?’ They answer their own questions: ‘The analysis suggests, however, that appropriate economic analysis would lead to a vastly different enforcement standard than is presently the case.’ (1989, 174).



that is to say the degree of competition necessary to ensure the observance of the basic requirements and attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.'

That is to say that competition policy may be subservient to other policy objectives, and is not, exclusively, a tool to achieve efficiency maximisation.

The Commission has made various claims for the operation of the law in its annual reports.<sup>33</sup> The widest are those made in the 1972 Report. This places stress on the general benefits of the policy;<sup>34</sup> the place of the consumer;<sup>35</sup> and the effects of anti-competitive actions on individual undertakings.<sup>36</sup> In its ninth report the Commission set out its goals at the time with some clarity:

'The first fundamental objective is to keep the common market open and unified ... There is ... a continuing need – and this is the primary task of the Community's competition policy – to forestall and suppress restrictive or abusive practices of firms attempting to divide up the market again so as to apply artificial price differences or impose unfair terms on their consumers. ...

It is an established fact that competition carries within it the seeds of its own destruction. An excessive concentration of economic, financial and commercial power can produce such far-reaching structural changes that free competition is no longer able to fulfil its role as an effective regulator of economic activity. Consequently, the second fundamental objective of the Community's competition policy must be to ensure that at all stages of the common market's development there exists the right amount of competition in order for the Treaty's requirements to be met and its aims attained. The desire to maintain a competitive structure dictates the Commission's constant vigilance over abuses by dominant firms ...

Thirdly, the competition system instituted by the Treaty requires that the conditions under which competition takes place remain subject to the principle of fairness in the market place [these principles are] ...

First, equality of opportunity must be preserved for all commercial operators in the common market.

A second aspect of the principle of fairness in the market place is the need to have regard to the great variety of situations in which firms carry on business ... this factor makes it necessary to adapt the Community competition rules so as to pay special regard in particular to small and medium [size] firms that lack strength.

Finally, equity demands that the Commission's competition policy takes account of the legitimate interests of workers, users and consumers' (EC Commission, 1980, 9–11).

The Commission as a body is charged with many functions – competition policy must be reconciled with various other goals which may complement, or conflict with, a competition policy directed purely to allocative efficiency:

33 Addressed to the European Parliament these show clearly the changes in emphasis over time.

34 'Competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy ... makes it easier for the supply and demand structures continually to adjust to technological development ... Through the interplay of decentralised decision-making machinery, competition enables enterprises continuously to improve their efficiency ... competition is an essential means for satisfying ... the individual and collective needs of our society' (at p 11).

35 'Competition policy endeavours to maintain or create effective conditions of competition by means of rules applying to enterprises in both the private and public sectors. Such a policy encourages the best possible use of productive resources for the greater possible benefit of the economy as a whole and for the benefit, in particular, of the consumer' (at p 12).

36 'Even though the operation of market forces is an irreplaceable factor for progress and the most appropriate means of ensuring the best possible distribution of production factors, situations can nevertheless arise when this in itself is not enough to obtain the required results without too much delay and intolerable social tension. When the decisions of the enterprises themselves do not make it possible for the necessary changes to be made at an acceptable cost in social terms, then recourse to relatively short-term and limited intervention is necessary in order to direct such decisions towards an optimal economic and social result.' (At p 17 in the context of a discussion regarding the use of state aids, but pertinent to competition policy in general.)



‘the powers conferred on the Commission ... show that the need to maintain effective competition can be reconciled with the need to safeguard objectives of a different nature and that, to this end, certain restrictions of competition are admissible where they are indispensable to the attainment of those objectives and do not result in the elimination of competition in respect of a substantial part of the common market’ (EC Commission, 1981, 36).

The fact that one of the fundamental aims of the Community is to integrate the economies of the member states has been crucial in shaping the policy. In the 1956 Spaak Report it was accepted that:

‘The Common Market will not by itself lead to the most rational division of activities if suppliers maintain the possibility of stocking users under different conditions, particularly according to their nationality or their country of residence.’<sup>37</sup>

This dominant concern which has been continually restated in decisions and cases, is evidenced in the continuing rule that territorial protection in distribution agreements is not permitted where parallel imports are excluded.<sup>38</sup> Korah (1986, 91) has commented that ‘integration has been elevated by the Commission and the Court to a goal in itself, more important than efficiency’.

At the same time it is clear that Community policy, if it addresses wider concerns than those of pure economic efficiency, will, as with the American regime, be subject to changing emphases as the Community adapts (whether to enlargement, changing economic circumstances, or a realignment of political goals). The questions that Frazer asked (1990, 609) in relation to ‘post-1992’ policy:

‘(1) How may we define the objectives of competition policy in a single European market? (2) Should competition policy be restricted to certain economic models or is it of a constitutional or socio-political nature? (3) Whatever the concepts or aims of policy, is it possible or even desirable to formulate policy in a precise way?’

can, of course be asked of any competition regime at any time, and remain valid in relation to Community policy at present. What is significant is that the goals of the policy were being questioned at a time when the Community was contemplating the fruition of one of its primary objectives.

### *Conclusion*

To the extent that competition policy addresses itself to the promulgation of economic efficiency it will be possible (albeit not perfectly) to test the extent to which any particular decision conforms with this objective. Thus much of the Chicago writing has been in the form of the analysis of specific practices within the terms of classical micro-economic theory. A significant amount of work has already been done to quantify the benefits accruing on the basis of micro-economic modelling. However, there are many lacunae as Morrison et al accept:

<sup>37</sup> In the original French: ‘Le marche commun ne conduirait pas par lui-meme a la repartition la plus rationnelle des activites si les fournisseurs gardaient la possibilite d’approvisionner les utilisateurs a des conditions differentes, en particulier suivant leur nationalite ou le pays de leur residence.’ (quoted, and translated, in Martin (1994, 59)).

<sup>38</sup> See, e.g. Cases 56 & 58/64 *Consten and Grundig v Commission* [1966] ECR 299, at 340; [1966] CMLR 418 at 471: ‘an agreement between a producer and a distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental object of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States ... could not allow undertakings to reconstruct such barriers. Article 85(1) is designed to pursue this aim’.



‘Uncertainty remains about the levels and treatment of cost incurred by parties to MMC inquiries and to some aspects of the benefits identified ... [t]he results also suggest that further work by other researchers on topics such as the phasing and the length of time benefits accrue, quantifying factors we have not considered, particularly dynamic aspects ... would all improve the analysis and robustness of the findings’ (1996, paras 1.37–1.38).

Where competition policy addresses other concerns, particularly those of a normative nature, testing of practice against the aims of that policy will have to proceed by other methods, and often by empirical observation of the consequences of any particular decision. Thus, for instance, decisions made in relation to the operation of bus routes will need to be considered in terms of the impact that such decisions have on the operation of the transport network in the relevant area in terms of the stated goals of that transport policy.

## COSTS OF COMPETITION POLICY

### *Introduction*

Less attention has, generally, been paid to the costs of antitrust than to its prospective benefits: in particular there is an information gap the reasons for which are, in part, addressed below.

The costs of competition policy may be divided broadly as follows: (1) direct costs of financing the regime, including the cost of pursuing specific cases; (2) compliance costs, including the cost of funding responses to investigation<sup>39</sup>; (3) the costs to the competitive structure of misapplication of the policy; and (4) the costs of reduced competitiveness due to conservative assessment of the law by commercial competitors.

In this section the composition and resourcing of the regulatory authorities will be discussed in greater detail. The role of the courts will be considered only in the extent to which judicial review of decisions taken by the regulators may be open to those affected. The domestic regime is, fundamentally, regulatory and not litigious.

### *Funding the regulation*

#### The UK

The regulators are: the Secretary of State for Trade and Industry (President of the Board of Trade) and the Department of Trade and Industry (DTI); the Director General of Fair Trading supported by the Office of Fair Trading; and the Monopolies and Mergers Commission. Whilst the role of the Secretary of State can be made clear the resourcing cannot. However, given that involvement with competition law is only a small part of the Secretary’s duties this omission is not of crucial importance. The DTI does not participate in individual cases other than by way of providing advice to the Minister in addition to that flowing from the OFT or MMC, and thus the department’s role can be largely ignored here.

---

<sup>39</sup> Although note concerns relating to rent seeking.



## THE DGFT AND THE OFT

The DGFT is required, by virtue of section 125 of the Fair Trading Act, to:

‘as soon as practicable after the end of ... each subsequent calendar year, make to the Secretary of State a report on his activities, and the activities of the Advisory Committee and of the Commission, during that year.’

The 1996 Annual Report was presented to the Secretary of State, on 28 May 1997. The personnel and resources of the OFT for the accounting year are given at appendix M1,<sup>40</sup> and of the MMC at appendix M2. For the year 1996–97 the budget of the OFT was £19.3 million.<sup>41</sup> This was to cover both the running costs and capital spending. The report itself does not provide a breakdown of the allocation of this amount between the two heads of spending. A breakdown of the percentage allocation of running costs for the year is given. This is as follows:<sup>42</sup>

BUDGET CENTRE	%
<i>Professional and advisory support services</i>	
Legal	7
Information	16
<i>Consumer affairs</i>	
Consumer policy	10
Regulatory	28
<i>Competition policy</i>	
International	4
Mergers	7
Monopolies and anti-competitive practices	13
Restrictive trade practices	10
Financial Services	3
Competition Law	2

Thus it may be seen that the application of competition policy consumed 39% of the total, with monopolies and anti-competitive practices taking 13% of the total, 33.3% of the competition total. However, as in practice enforcement activity encompasses the work of the Office’s economists and lawyers, and as information dissemination is an important aspect of the role of the OFT in relation to competition policy, there is little to be gained from a closer examination of these figures. Over the year 1996/97 the average number of full-time staff employed by the OFT was 402.<sup>43</sup>

## THE MMC

Prior to 1996 the budget for the operation of the MMC was subsumed within that of the DTI, and the MMC did not prepare full audited accounts of its operating budget. Full accounts were prepared for the first time in the financial year beginning 1996, although these have not been made public. The Annual Review does, however, give an indication of the Commission’s spending.

40 The OFT’s accounting year runs from 1 April to 31 March. The figures given are therefore up to date as of 31 March 1997.

41 In 1995–96 the budget was £13.4 million; in 1994–95 the budget was £19.6 million; in 1993–94 the budget was £19.3 million, as it was in the year 1992–93.

42 These figures exclude running cost resources for Treasury Solicitors.

43 Made up as follows: 67 senior staff; 163 executive grades; 172 others. Included in those totals are the following specific staff: 12 lawyers; 18 economists; 4 statisticians; 2 accountants; 4 internal auditors; 3 staff inspectors; and 10 information officers.



In 1996/97 the expenditure was £7.9 million, although the figure bears a direct relationship to the number of inquiries in which the MMC is involved in any year.<sup>44</sup> The Commission consists of members, of whom at 1 January 1995 there were 35, and staff, of whom on 1 January 1995 there were 82 full-time equivalents. Because of the fluctuating nature of the workload of the Commission, which has little control over the making of references to it, it relies too on employing increased numbers of part-time staff when needed, and on contracting out. Over the year 1994–95, and following on from the recommendations made by Price Waterhouse in its quinquennial review of the operation of the MMC, the Commission

‘carried out a major exercise to invite and assess tenders for the various elements of work such as economics, accounting and management consultancy. As a result [the Commission has] entered into framework agreements with 28 firms’ (MMC, 1995a, 5).

The practice of employing part-time staff, whilst it carries with it cost-savings has met with some criticism. The Consumers’ Association, in its evidence to the Select Committee made the point that:

‘the MMC Commissioners appointed to deal with individual investigations have an extremely difficult task ... But at the end of the day judgments are made by the individual Commissioners for whom MMC membership is only a part-time occupation’ (HC 249–ii, 49, para 5(b)).<sup>45</sup>

The Association argued that this was one factor responsible for a ‘reputation for quirkiness and unpredictability which is as damaging, in the long term, to business as it is to consumers’ ((HC 249–ii, 49, para 5(b)). The appointment of members to the Commission is a matter for the DTI, although the Chairman ‘might be consulted about the kinds of backgrounds of people’ (HC 249–i, 9, Q23) that are wanted at any particular time.

#### THE BI-PARTITE SPLIT

One of the key recommendations of the Select Committee was that:

‘the current OFT and MMC be replaced by a single Competition Authority headed by a small number of full-time Commissioners who would decide together on cases prepared independently by the Secretary General and officials of the Authority’ (HC 249–I, lvi, para 11).

Many of those presenting evidence to the Committee criticised the plethora of authorities responsible for the enforcement of competition law in the UK,<sup>46</sup> although not all favoured the introduction of a unitary authority. Sir Bryan Carsberg argued that ‘a unitary authority may be more efficient in the conduct of its business ... and may be more purposeful in the pursuit of the objective of promoting and protecting competition’ and that ‘institutional streamlining could do a lot to speed up investigations’ with burdens on all parties being reduced as a result (HC 249–i, 30). Graeme Odgers, however, remained opposed to any such move, arguing that the present

<sup>44</sup> Having been £7.4 million in 1995/96 and £6.6 million in 1994/95.

<sup>45</sup> HC 249–ii, p 49, para 5(b). The Chairman of the MMC, Graeme Odgers, put it slightly differently when responding to pressure to explain the application of the ‘public interest’ test: ‘When you think of what the MMC is, it is a bunch of people really. It is 32 individuals, they come from a huge range of different backgrounds, from the professions and business, from the trade unions, from academia, a wide range of different backgrounds, people who have had a tremendous experience and are experts in that field’ (HC 249–i, 8, Q 18).

<sup>46</sup> Criticisms of this aspect of the regime have been raised consistently by participants in the three case studies reported on at Chapters 6–8 below.



system had withstood the test of time and should not be discarded. His answer to the questions put by Dr Hampson (HC 249–i, 10) merit citing in full:

Q ‘We have an odd system, do we not, the three way split ... [w]hat are the advantages of doing it this way?’

A ‘Well, first of all, it has been going for a long time and I think it has met the test of time in that it has been in being for some 40 odd years. It has been reasonably flexible in terms of dealing with the changed economic circumstances. My view is that by having these checks and balances and a separation of powers, it means that the investigation is done in a thorough and fair and unbiased way uninhibited by prosecutory zeal or by the burdens of Government in terms of the ultimate executive decision making. I think that makes for a fairer and better analysis and judgment of the public interest. I think myself, as I said earlier on, that having made our quasi judicial finding with our recommendation, I think it is right in fact that the ultimate decision if a substantive change is to be made in an industry, that that decision should ultimately be made by Government, subject, of course, to Parliament. It is the role of Government ultimately to govern. Really I do feel that a separation of functions—the prosecutory, as it were, that is the initial investigation and the referral to the OFT, ourselves being very much the judicial body based to some degree on a kind of jury system and then the Government ultimately coming to the executive decision in a case of a public adverse finding—I think that it has great merits and I think we have to be careful about substantive change.’

#### Investigations/Reports

A crude method of estimating the costs of MMC reports<sup>47</sup> is to contrast the annual budget of the MMC with the number of reports produced in that year. The following figures are given in the evidence of the MMC to the Select Committee (HC 249–i, 3–4):

Year*	budget (£ m)	Number of reports†	Average report cost‡
1987–88	3.5	13	—
1988–89	4.4	12	291,666
1989–90	4.3	30	146,666
1990–91	5.7	28	153,571
1991–92	6.2	21	271,428
1992–93	5.5	17	364,705
1993–94	7.3	15	366,666
1994–95	6.8	12	608,333

\* Financial year

† First full calendar year (i.e. the 13 reports in the first row were published in 1987. These reports include all reports completed by the MMC.

‡ A mean average, taking the previous financial year's budget. (i.e. the first figure is produced by taking the budget for the 12 reports of 1988 as being produced from the financial year 1987–88.)

It will be apparent that this is not a satisfactory way in which to derive a ‘per report’ cost. The approximations are at best crude and take no account of the individual costs of particular reports, and the preceding investigation. On rare occasions the MMC has published what it considers to be the cost of particular inquiries, although it has been stressed by the Secretary to the MMC that these are, at best, estimates, and that accurate figures are unobtainable.<sup>48</sup> It should be stressed too that these figures take no account of costs incurred, either prior to the

<sup>47</sup> Suggested by the Secretary of the MMC, Anthony Nieduszynski, to the author, 1 June 1995.

<sup>48</sup> To the author on 1 June 1995. The Secretary suggested that, roughly, the figures for different types of inquiries would be as follows: for 2 months newspaper merger circa £100,000; 3 months typical merger £150,000 – £200,000; full public interest circa £750,000. The figure for a full public interest inquiry would vary greatly depending on the terms of reference, and the industry or practice under investigation.



report or subsequently, by either the OFT or the DTI. However, from the financial year 1995/96 the MMC has changed its accounting procedures and may be in the position to provide figures for internal costs of particular investigations/reports. Thus the author has been told that the cost of the inquiry into Classified Directory Advertising Services (MMC, 1996c), considered further in Chapter 6, below, was ‘just under £0.5 million’.<sup>49</sup>

### *Costs to industry of competition policy*

#### *Compliance costs*

The most obvious cost to industry of UK competition policy is, in the general absence of penalties for anti-competitive conduct, that of complying with the investigative process, and these will be considered in detail in Chapters 5–8.<sup>50</sup>

There is little substantial evidence about the costs of case by case investigation, although, the DTI commissioned a report from Ernst & Young that suggested that companies ‘had invested considerable time and effort, usually from senior managers, during the course of [inquiries]’ derived the following figures relating to internal and external costs (Ernst & Young, 1993, 9):

Cost of Internal Resources	% Firms Responding	Cost of External Resources	% Firms Responding
< £25,000	43%	None used	16%
£26,000–£150,000	14%	£1–£50,000	16%
£151,000–£250,000	14%	£51,000–£250,000	40%
£251,000–£500,000	29%	£251,000–£500,000	20%
		£501,000–£750,000	8%

These costs are derived from a small sample, and do not distinguish between the different types of MMC inquiry, nor do they differentiate between OFT and MMC investigations.<sup>51</sup> The DTI in the course of meetings with respondents to its discussion document ‘attempted to discover what the compliance costs of dealings with the competition authorities were’ and found that ‘the high cost, sometimes perceived, sometimes actual, of MMC enquiries was an important factor in determining whether firms would seek to give undertakings to avoid a reference’. While the DTI ‘heard estimates for the compliance costs of an MMC enquiry of between £100,000 and £1 million plus’ (DTI, 1993, 3) no specific figures are given in the report.

### *Misapplication of policy*

That conclusions reached by the OFT and MMC have been criticised as being themselves harmful in application is to be expected (see, e.g., Liesner and Glynn, 1987), and some of these criticisms are considered further in the next chapter when the application of the law in specific cases is considered. It has been suggested in the American context that:

<sup>49</sup> Geoffrey Williams, MMC Finance Manager, correspondence with the author, 4 December 1996.

<sup>50</sup> If Scherer is right (see below) these costs are likely to be more important and of a higher magnitude than any other adverse effects of antitrust.

<sup>51</sup> The methodology and sampling strategy from which these figures are derived are set out in Chapter 2, above.



‘There is a specter that haunts our antitrust institutions. Its threat is that, far from serving as the bulwark of competition, these institutions will become the most powerful instrument in the hands of those who wish to subvert it’ (Baumol and Ordover, 1985, 247).

The authors focus on the availability of treble damages in America, which has been criticised on efficiency grounds elsewhere. In the EC, it is suggested, the incentives for ‘abuse’ of the process is less than it is in the US (at 261–263). In the UK one must balance the lack of direct ‘reward’ available to a complainant with the fact that making a complaint may be a very cheap form of rent-seeking. This factor, and the approach of the OFT, is discussed in Chapter 5 below.

#### Reduced competition?

The extent to which antitrust imposes other costs is a matter of some debate. The question of whether it is possible to identify specific efficiency-retarding impacts of antitrust has been described as ‘hopelessly difficult’ (Scherer, 1987, 998), although Scherer concludes that while

‘antitrust policy may have had some negative impact on “efficiency” ... the efficiency losses are probably small and outweighed by efficiency gains in other, more difficult to measure, areas’;

and (at 1002) that while:

‘critics of antitrust claim that antitrust enforcement can induce X-efficiency losses by fragmenting market structures so as to sacrifice scale economies ... Whether, on balance, antitrust enforcement ... has had much of an effect on costs either way, however, is doubtful’.

In the context of regulation in the UK it is important that the regime of the Fair Trading Act 1973 and the CA 1980 is ‘softer’ than that of either the US or the EC (and the latter’s spill over effects into the UK will likely affect only the very largest of enterprises where monopoly action is concerned). Therefore firms are less likely to be constrained by that regulation. While in America for instance it is argued that IBM’s growth was curbed by antitrust litigation (Heller, 1995), there are no comparable instances in the UK. It should be noted however that Frazer (1995, 853) has found that the majority of respondents to a survey of larger companies in the UK, 83.7% either agreed, or agreed very strongly, with the statement ‘companies should always comply with all competition laws’. This evidence, combined with the answers to two further questions relating to sanctions generally and criminal sanctions specifically, lead Frazer to conclude that there is ‘a more general concern with questions of legitimacy than with a desire to avoid or reduce the probability of penalties’ (1995, 854).<sup>52</sup> However, the DTI itself is not so convinced, and its research into the operation of the regime suggests, in relation to the Competition Act 1980, that ‘it was not seen as a deterrent to those who might engage in anti-competitive practices’ (1993, 11)<sup>53</sup>. At the same time it should be recognised that companies may often believe both that the law should be followed (irrespective of the penalties for infringement) and that they are following the law, yet in fact may be found to be operating against the public interest or contrary to the Competition Act s 2(1).<sup>54</sup>

<sup>52</sup> The same survey, however, produced the result that 79.2% of companies placed the ‘imposition of fines for infringement’ as the most significant factor that might encourage further measures to comply with UK law (Frazer, 1995, 855), although Frazer argues that on the whole the evidence suggests that the ‘respondents were motivated more by questions of legitimacy than by the desire to avoid penalties’.

<sup>53</sup> While it might be pointed out that there is a subtle distinction between the deterrent effect of illegality generally and of penalties once the company has decided to ignore the mere fact of illegality it is unlikely that this distinction was being made by the DTI.

<sup>54</sup> Frazer (1995) recognises that the precedent value of MMC reports may be weak, and this view is supported by Ernst & Young (1993, 6) which found an ‘underlying policy which was regarded as unclear and inconsistent’, but see generally evidence collected in Chapters 5–8 below.



## MEASUREMENT OF COSTS AND BENEFITS

Attempts to measure in total the costs and benefits of antitrust have been unsatisfactory when relating to the USA, and the author is not aware of any comparable work based on UK data. Writing in 1982 Stigler commented that:

‘Unfortunately there have been no persuasive studies of the effects of the Sherman and Clayton Acts throughout this century. Simon Whitney’s two-volume survey<sup>55</sup> reaches a favourable verdict on the antitrust laws, but his chapter surveys of industries and cases are joined to his conclusions by leaps of Olympic grandeur. My attempt in 1966 at measurement of the effects of the antitrust laws was able to dismiss nonsense such as the prohibition of interlocking directorates, but reached only feebly favourable presumptions on Sections 1 and 2 of the Sherman Act. James Ellert’s<sup>56</sup> more recent comprehensive analysis of the influence of antitrust on stock prices of defendant companies finds only small effects at best, except when triple damages suits follow’ (1982, 5).

Where there have been attempts to measure aspects of antitrust these have followed the Harberger and Harberger-derived models, and have been primarily concerned to establish the cost to public welfare of the dead-weight welfare loss (see above).

There are, as has been suggested above, sound theoretical reasons to believe that in the context of a non-prohibitive non-penalising regime such as is the case with the UK, the primary costs of the regime are those of the participation in the regulatory process. Where benefits flow, in whatever form, these are likely to be determined largely by the *attitudes* of business to the regime. These then are the two issues on which this work will focus, and no attempt will be made to supplement the Harberger tradition.

Scherer has noted that empirical testing ‘has been held back by data limitations’ while ‘the theoretical work is limited only by the elastic bounds of scholars’ creativity’ (1987, 1010). If that is true of the USA, where information, particularly that emanating from government sources, is more readily available than in the UK, it is doubly so of the UK.

## CONCLUSION

As this work is generally concerned with the assessment of the costs and benefits of the application of a specific competition policy operating in the UK it is necessary to draw conclusions as to what costs and benefits are to be taken to be. The preceding work draws together many theoretical and practical arguments and reveals that in some matters there is a strong degree of consensus, while in other areas, such as the extent to which competition policy should address, e.g., income distribution, there is less agreement.

The assessment of the benefits that flow from the application of competition policy is more difficult than is an assessment of the costs. This is particularly the case in the UK where so many actions taken result in no change in either market conduct or structure in the individual case. At the most fundamental level benefits may accrue where either market structure or performance is affected by the policy’s application.<sup>57</sup>

<sup>55</sup> Whitney, S. 1958. *Antitrust Policies*, New York, Twentieth Century Fund.

<sup>56</sup> Ellert, J. 1975. ‘Antitrust Enforcement and the Behavior of Stock Prices’, unpublished doctoral dissertation, University of Chicago.

<sup>57</sup> This conclusion flows whether the Harvard or Chicago school provide the model of choice, and conforms too to the new industrial economics.



Typically, and most obviously, one may look at the number of firms in a market in the first instance. If the application of competition policy allows a potential entrant to become a real entrant,<sup>58</sup> or a struggling incumbent to survive in the face of a larger incumbent's pressure then benefits may be presumed to flow to consumers, and the dead-weight welfare loss will be less than would otherwise be the case. This argument needs some qualification if competition policy is misapplied to allow an inefficient entrant or smaller incumbent to survive in the face of competition driven simply by greater efficiency or returns to scale. Where even in the long run the smaller firm cannot match the efficiency or returns of the larger the question may still be asked if the presence of that firm acts as a restraint on the power of the larger to raise price and restrict output. The same analysis follows for any action that has the effect of reducing barriers to entry, even where entry does not immediately follow, although the quantification of the benefit in either case will be difficult. Similarly the collapse of a horizontal agreement may be expected axiomatically to lead to benefits. As the purpose of such an agreement is to allow the participants to approximate the position that would be achieved were they instead a single firm monopoly prices will, *ceteris paribus*, drop and output increase following the collapse.

Where structure cannot be affected benefits have to be looked for in the conduct of the participants in the market following investigation. Most visibly prices may drop, and, *ceteris paribus*, supply increased. This can be effected notwithstanding a static market structure if the appropriate regulatory tools are in place. Such an effect is considered in Chapter 7, below.<sup>59</sup> Such an action has the dual effect of reducing the dead-weight welfare loss, and also redistributes income, although some may question whether the latter effect should be counted as a benefit.<sup>60</sup> Ties between products may be broken,<sup>61</sup> or full-line forcing and bundling prevented, reducing the monopolist's control simply to those products in which the monopoly genuinely exists. If the market becomes a more transparent one to the consumer benefits may flow, although these are likely to be difficult to assess. It seems clear, however, that lack of symmetry in information strengthens a monopolist's ability to exploit that position.<sup>62</sup> It must be stressed, however, that even where such benefits may be found their quantification may be very difficult, if not impossible. One has only to consider the fact that arguments still rage about the amount of dead-weight welfare loss in the economy as a whole some 45 years after Harberger's groundbreaking work. In Chapters 5, 6 and 7 an attempt is made to consider whether any of these benefits may be found to have been created in each of the cases, and if so to consider whether the benefit may be quantified.

The costs of the application of the policy are more easily categorised, although this does not mean that they will necessarily be easy to calculate. There are the direct costs to the state, found in the funding of the regime generally, and the costs of specific actions, and the direct costs that a reasonable response requires of the parties subject to the investigation. These are the costs referred to in a Government argument made to the House of Commons Select Committee on Trade and Industry

'the Secretary of State expects the DGFT to bear in mind the costs of an MMC investigation, both to the commercial parties and to the public purse, before deciding

58 Such a response is clearly an outcome in the application of the essential facilities doctrine, considered further in Chapter 4, below.

59 In this case *Classified directories* the MMC considered that entry was not feasible given the strength of the incumbents, and opted instead for an RPI-X price formula.

60 See Scherer, noted at p 23 above.

61 See the discussion of these practices in Chapter 4, below, and see particularly Chapter 7, and the links between travel insurance and package holidays.

62 See, for example, the *Photocopier* reports considered in Chapter 4, below.



on a reference, and to consider whether the expected benefits are likely to be proportionate to the costs'.<sup>63</sup>

Such costs will be known if the required cost accounting structures are in place. As has been shown, for much of the MMC's history they have not been. Where the costs are not accounted for in this way, or where the information is not disclosed, a qualitative approximation may be ascertained by a consideration of the commitment and resources invested in the investigation, both by the public and the private parties. These costs should, as the OFT noted (Morrison et al, 1996), exclude rent-seeking activity. The point at which a legitimate response becomes a rent-seeking one is a matter of judgment, although some attempt is made to consider this area in Chapter 7. Further costs may be found in the required response to any finding of anti-competitive conduct on the part of the agencies, or to a settlement reached between the agencies and the commercial parties. These are likely to be known by the parties themselves. If it is accepted that active third-party involvement may be required to ensure that some of the benefits sought for from the application of the law are achieved the costs to them of participation in the system may also be considered. An attempt has been made throughout Chapters 5–8 to quantify and assess these costs. More generally the costs imposed on the economy as a whole in terms of any dampening effect on productivity, or innovation, caused by the existence and application of competition law, will be far harder, if not impossible, to assess. No attempt here has been made to assess such costs, although some concerns are noted in Chapter 5 about the allegedly over-defensive use of competition policy by small entrant firms into the bus market.

It is only recently that the Monopolies and Mergers Commission was able to account for its expenditure on references, and it remains reluctant to do so, and companies are understandably reluctant to divulge the costs they incur in the course of setting out their position. Where outcomes are being considered, and in particular if companies are required to modify commercial practices information becomes commercially highly sensitive. The ways in which information has been gathered in the course of this work, and the methodology adopted in general, is set out more thoroughly in Chapter 2.

---

<sup>63</sup> HC 249-iv, 110, para 13.



# Chapter four — OFT and MMC Reports: past activities and outcomes

## INTRODUCTION

Competition investigations carried out under either the Fair Trading Act 1973 or the Competition Act 1980 can, as is discussed further in the Annex, terminate at the Office of Fair Trading, or proceed to a Monopolies and Mergers Commission reference. A full MMC reference will result in a published report, and possibly in the imposition of a requirement to modify conduct identified as being against the public interest under the Fair Trading Act, or anti-competitive within the terms of the Competition Act 1980.<sup>1</sup> Where the conduct is examined only by the OFT three scenarios other than the making of a formal reference are possible. Firstly the OFT may reach the conclusion that there is no basis on which to proceed; secondly it may identify conduct that is anti-competitive, but that maybe rectified by the company(ies) on an informal basis; thirdly it may accept an undertaking in lieu of a formal reference, an option provided by the Deregulation and Contracting Out Act 1994. Two of the reports considered in the case studies below<sup>2</sup> led to the making of undertakings.

In assessing the impact of the operation of the regime in the UK outcomes must necessarily be considered, although any such examination cannot be a straightforward one. Information about the extent of informal resolutions achieved between the OFT and companies under investigation is difficult, if not impossible, to obtain, and it is accordingly hard to assess the extent to which compliance with competition law, and attendant benefits, flows at this stage. Undertakings are published, but as is discussed later in this chapter it has proven impossible within the confines of this research to obtain accurate information about their operation and impact. In both of these cases, however, the conduct complained of may be less damaging than is the case where a full reference is made. Further, the costs of operating the regime at this level, both to the public purse and to those subject to the regime, is certainly far less than is the case where formal reports and references are made. It remains the case that the most visible aspect of the work of the domestic regime is the formal investigation of anti-competitive conduct concluding in either

---

<sup>1</sup> The specific words of the relevant legislation are important, for it is these that set the limits to the ability of the regulatory agency to control conduct. In an early report dealing with predation under the Competition Act the OFT noted that:

‘predatory behaviour is not itself referred to in the Act. Considering the actual terms of the relevant law, the first point to consider is the import of the expression “restricting, distorting or preventing competition”. A practice which eliminates a competitor is a restriction of competition ... A practice which deters potential competitors with the threat of overwhelming retaliation is a prevention of competition, and the feasibility of predation rests upon the likely success of deterring entry. A practice which distorts competition might take the form of biasing the workings of the market in favour of one party whose relative efficiency and quality of service do not confer such advantages. It is not, however, necessarily a restriction or distortion of competition to adopt measures which make every party try harder or accept narrower margins’ (*West Yorkshire Road Car Company Limited: Fares policy on certain routes between Bradford and Skipton* (OFT, 15 August 1989, para 5.20)).

<sup>2</sup> See Chapters 6 and 7.



an MMC or OFT report. It is this aspect of the system that has been of the greatest interest to critics of the regime, whether from within industry, consumer bodies, or within government.

In this chapter a wide range of past reports of both the MMC and the OFT are considered, with the emphasis being on the more costly and more numerous MMC reports.<sup>3</sup> The purpose of this survey is to consider the extent to which outcomes may be identified in relation to past enforcement activity, to consider the desirability of MMC activities, and to record those activities. Conclusions reached by the MMC in specific cases are not re-examined – an exhaustive critique of specific reasoning is beyond the scope of a work concerned more with procedure than with micro-economic analysis, although some economic content is introduced in order to explain the problems raised by certain patterns of conduct. Particular emphasis is placed on the extent to which a costly investigative process results in any required conduct modification, and the extent to which, where it does so, there is consistency or divergence across reports dealing with apparently similar situations. A further, and related, question is that of the extent to which a report may serve as a useful precedent, resulting in outcomes both through a response in the immediate case and through others amending conduct as a result. Although this issue is considered in some detail in Chapter 5, below, and returned to again in Chapter 8, the answer will be determined in part by the extent to which the MMC adopts a consistent approach in its reports.

## THE REPORTS

Two approaches may be taken when considering OFT and MMC reports. The first, would be to deal with every report chronologically. Such an approach has the benefit of being comprehensive, but loses coherence. The second approach, which has been adopted here, is to consider a range of reports, organised under various categories or headings. While this allows for a thematic development, and is more likely to reflect the way in which reports may be relied upon by industry subsequently, any such categorisation is open to challenge, and necessitates some duplication when an individual report deals with a range of anti-competitive practices, as is often the case.

In this chapter anti-competitive practices have been placed into two main groupings following the work of Porter (1980 and 1985): those which are ‘competitive’, designed either to create a monopoly, or to strengthen a monopoly by raising barriers to entry; and those which are ‘exploitative’, designed to increase the supernormal profits earned by the successful monopolist. This is consistent also with the consideration of benefits that may flow from the amendment of either the market structure or the performance of the firms in the market if the former is not effected, raised in the conclusion to the previous chapter. Further classification within these main divisions generally follows that of standard industrial economics and competition texts.

---

<sup>3</sup> A starting point for this chapter is the work produced for the OFT by Myers (1994). Reports of the MMC prior to 1966 have been summarised in Wilberforce, Campbell and Elles (1966, Appendix III) and will not be considered below. The approach here will focus on investigations initiated under the Fair Trading Act 1973 and the Competition Act 1980. It must be stressed that under the Competition Act the OFT is called upon to consider only whether there has been a ‘course of conduct which ... has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition’ (s 2(1)). It is not for the OFT to determine whether this course of conduct is justifiable under the public interest test, although a finding that s 2(1) applies suggests at the least that some damage may be being done by that conduct. This Chapter is intended only as a concise introduction to the range of approaches adopted under the Acts, and cannot provide a full analysis of each of the practices under consideration, or a full evaluation of each report.



## Competitive Strategies

### Introduction

It is axiomatic that any potential entrant into an industry faces barriers to entry which may range from the mere necessary adjustment of the internal business culture, or to the need to develop new plant, processes and distribution channels. The extent to which the presence and/or erection of such barriers should be a concern of regulators is hotly debated, and it was the de-emphasising of such barriers that in part characterised the Chicago movement when it emerged. The question at the heart of the debate is that of whether *all* barriers to entry should form the legitimate subject matter of competition law. The position is summed up by Bork (1978, 310):

‘When existing firms are efficient and possess valuable plants, equipment, knowledge, skill and reputation, potential entrants will find it correspondingly more difficult to enter the industry, since they must acquire those things. ... But these difficulties are natural; there can be no objection to barriers of this sort. ... The question for antitrust is whether there exist ... barriers that are not forms of superior efficiency and which yet prevent the forces of the market – entry or the growth of smaller firms already within the industry – from operating to erode market positions not based on efficiency’.

Some commentators however, Bork included, go even further than this, and argue that tactics aimed at offsetting short term losses in return for long term profit can never be successful – and by extension should be of no concern to regulatory authorities. Such a position may be usefully contrasted with the evidence of attempts by businesses to do just that, and with the strategies advocated by business ‘gurus’ (e.g. Porter, 1985).<sup>4</sup> Porter outlines the ‘well implemented offensive strategy [that] constitutes the single best defence by a challenger’ (1985, 482) and recognises that ‘[m]ost defensive tactics are costly and reduce short term-profitability in order to raise the longer term sustainability of a firm’s position’ (Porter, 1985, 487). London Economics have concluded that (1994, 21):

‘the presumption that predation is not a rational strategy has been shown to be false in the recent literature ... Rather, predatory behaviour can be part of a rational strategy under conditions in which there is no differential access to resources and each firm understands perfectly the incentives in the situation at hand’.

A case-by-case approach to predation on the part of regulatory authorities can be justified on the grounds that it is not possible to demonstrate with any certainty that in all cases predation, even if successful, is socially harmful.

Where an incumbent monopolist faces a threat from a potential entrant Porter notes three types of tactics that the attacked monopolists may turn to in the first instance, these are those that: (1) raise structural barriers; (2) increase expected retaliation (and thus make entry appear less attractive to the challenger); and (3) lower the inducement for attack.<sup>5</sup> If entry has been achieved

<sup>4</sup> A detailed review of the theoretical arguments is beyond the scope of this work, and the interested reader is referred to the paper produced by London Economics (1994) as a starting point. It is indisputable that businessmen seek to create and maintain such barriers.

<sup>5</sup> The following strategies are outlined:

‘Structural barriers to entry/mobility are sources of disadvantage for a challenger relative to the firm. The presence of structural barriers worsens the challenger’s expected profit from a move. For example, General Foods’ Maxwell House Coffee brand enjoys scale economies in marketing that will force a challenger to bear higher than proportional marketing costs relative to General Foods until it reaches proximity in market share. These higher costs will reduce the challenger’s projected profit from entry below that of General Foods, and therefore reduce the likelihood of a challenge.

The second type of defensive tactic is those that increase the threat of retaliation perceived by challengers. Expected retaliation by the firm will lower a challenger’s revenues or raise its costs, and thus erode the challenger’s expected profitability. Raising structural barriers and increasing expected retaliation both



a different set of alternatives faces the established firm. There will also be situations in which the prospective entrant has greater resources, and can more successfully engage in predatory conduct than can the incumbent. This was the case in Darlington when large bus companies from outside the immediate region moved against a fragile and ill-managed smaller incumbent. The tactics used in this situation were considered by both the OFT (1995c) and by the MMC (1995b) and are discussed further in Chapter 5. Since the same practice may be undertaken both in order to deter entry, and to drive out a smaller or weaker incumbent, the following analysis will proceed on a practice-by-practice basis.<sup>6</sup>

### Predation

The OFT in *Thamesway Limited* (1993c, 8.4) defined predation as:

‘the acceptance of losses in a particular market which are deliberately incurred in order to eliminate a specific competitor, so that supra-normal profits can be earned in the future, either in the same or in other markets’

and Myers (1994) focuses on ‘behaviour, involving the elimination of a competitor’ (1994, para 1.5).<sup>7</sup>

The OFT’s approach to predatory pricing has developed as it has gained experience in investigating allegations of the practice, particularly in the deregulated bus industry.<sup>8</sup> The views of the OFT were clearly set out in *Becton Dickinson* (OFT, 1988a): it would treat pricing below short run marginal cost as *clearly* predatory, and further suggested that prices above short run marginal cost *can* be predatory, but that in such cases further evidence would be sought to support the contention. The first formal Competition Act report into such conduct in the bus market was in August 1989 when the OFT considered allegations of predatory pricing made against an incumbent by a smaller entrant in relation to bus routes between Bradford and Skipton (OFT, 1989a). In response to the entry into the market of Pinnacle Coaches it was alleged that West Yorkshire Road Car Company (WYRC) had engaged in predation by offering return bus tickets on the relevant routes for the price of single ticket (‘free return travel’). The OFT took into account the fact that the industry was only just adjusting to the fact of competition,<sup>9</sup> and, as it has done on every occasion since, referred to the ‘fine distinction’ between vigorous competition and predatory

---

### *Contd*

seek to worsen a challenger’s position vis-à-vis cost drivers or drivers of uniqueness, thereby eroding its relative position.

A third type of defensive tactic involves lowering the inducement for challengers to attack. While raising barriers and expected retaliation is aimed at reducing a challenger’s expected profit, lowering the inducement requires that a firm accept lower profits. If a firm reduces prices or takes profits in an interrelated business unit instead of in the industry, for example, a challenger will see less to gain if an attack is successful’ (Porter, 1985, 487–488).

- 6 Any such classification inevitably introduces an arbitrary element, and the classifications adopted here do not reflect such a division of approach in all competition regulation or in all aspects of antitrust legislation.
- 7 ‘Low prices or price reductions are normally seen as a benefit from and the successful result of the process of competition. Predatory behaviour constitutes a class of anti-competitive behaviour where prices are *too low*, to the extent that the competitive process itself is damaged’ (Myers, 1994, para 1.1). See also Utton (1994). For a consideration of some of the theoretical arguments, and the approach taken by the EC Commission in *ECS/AKZO* (Commission Decision 85/609) see Smith (1989).
- 8 Some emphasis is placed on the matter here as allegations of predation underpinned the investigation considered below in Chapter 6.
- 9 At para 5.5: ‘The industry has a long history of regulation, and until it adjusts fully to the competitive environment there is bound to be uncertainty ...’. As with later investigations the OFT had to bear in mind that one of the aims of the Transport Act 1985 ‘was to introduce more competition into the market for local bus services, thereby reducing fares and encouraging the introduction of new and better services’ (OFT 1989b, para 5.4).



behaviour. Finding that the prices set by WYRC sufficient to cover variable costs the OFT then considered whether they were also capable of covering overheads in the long run. On the basis of a limited survey the OFT felt that WYRC's behaviour was not sustainable in the long run, and that, on the face of it this could provide evidence of predatory behaviour. The lack of conclusive evidence, however, persuaded the OFT to consider also the intent shown by the incumbent. While WYRC had not responded to larger entrants with price cuts, and could not provide figures to establish a basis for the company's suggestion that the purpose of the cuts was to increase patronage, it had also cut prices on routes where it did not face competition, and had not, as it was able to do under the regulatory system, changed the times at which buses ran so as to spoil the route for the entrant. In conclusion the OFT felt that an allegation of predation was not, on the evidence, supported. While there was no requirement on the company to modify conduct the report may still have value in its development of the agency's approach to predation, which may have been relied upon by companies in following cases, although as seen below the argument developed further, and the report's precedent value may thus have been undermined.

In *Highland Scottish Omnibuses* (OFT, 1989b) an allegation of predation was made based on price-matching to the entrant's fares rather than price cutting. In the report one of the factors stressed was the asymmetry in information in favour of incumbents in an industry 'where 50 years of regulation have conditioned operators to accept a lack of direct competition as the status quo, so that new entrants are likely to be unsure about how existing operators will respond to competition' creating a situation where 'existing operators have an incentive to build up a reputation for toughness in the face of competition in order to deter new entrants' (OFT, 1989b, para 5.9). On the basis of the OFT's definition of predatory pricing the cost and revenue curves of the entrant would have little bearing on a finding of predation on the part of the incumbent, and a price matching strategy could then be predatory, as long as the strategy would be feasible. In this case, on the basis of accounts provided by Highland Scottish, the OFT concluded that, in the relevant period, 'costs exceeded revenue ... Highland was incurring avoidable losses on its network of services in Inverness in the period immediately after the emergence of competition' (OFT, 1989b, para 6.4). The DGFT therefore concluded that, following a finding that s 2(1) of the Competition Act 1980 applied, a s 5 reference would be made to the MMC. The MMC reported at Cm 1129.

Similar allegations were dealt with in *South Yorkshire Transport Limited* (OFT, 1989c), with the refinement that the fare reductions were very specifically targeted, in one instance applying in one direction only, being aimed at a particular pick up point operated by the entrant. The highly selective focus of the price cuts, the fact that the service in question did not contribute to a large part of the company's overheads, and the fact that fares rose immediately following the exit of the entrant all contributed to a finding of predation. The matter was not referred to the MMC, and was resolved between the OFT and the company.

In *Kingston upon Hull* (OFT, 1990a) the incumbent targeted fare reductions, it was alleged, so as to cover only times at which the entrant's services were to run. The OFT in this case concluded that 'a substantial operating profit was achieved on each route ... losses have not been incurred and therefore [the incumbent] has not engaged in predatory pricing' (OFT, 1990a, para 5.14).

In *Thamesway Ltd* (OFT, 1993c), the allegation was that a 'Summer Fares Bonanza' on buses passing through Southend on Sea was predatory. The OFT found that the effect of the price cut was to increase the market share of Thamesway, and that revenue rose although there was little increase in costs. The gain in the fares bonanza led to a reduction in losses that were already being sustained and was therefore *not* predation.



The MMC considered the issue in *Southdown Motor Services Ltd* (MMC, 1993c)<sup>10</sup> where there was vigorous competition between Southdown, owned by Stagecoach, and an established smaller operator, Strikeline Ltd (operating as Easy Rider). Accepting that there were times when it would be reasonable to consider a bus network as a whole, and that in such a situation routes might be operated that were unprofitable where there were benefits for the network as a whole, the MMC was of the opinion that there were no network benefits from the unprofitable operation of the contested routes in this case. Emphasis was placed on Southdown's stated intent 'to put pressure on Easy Rider by increasing the frequency of its services' (MMC, 1993c, para 6.20), while Southdown contested the extent to which the OFT had relied on an analysis of intent, arguing that intention could be assessed only following the exit of the victim by examining the incumbent's behaviour at that time. The MMC also rejected this point, and, clarified the regulators' concerns regarding predatory conduct:

'The benefits of competition policy are not, however, confined to ensuring that operators do not make excessive profits. Competition also provides a mechanism to ensure lower costs, innovation in service, and an adequate quality of service. [The removal of Easy Rider] could, therefore, adversely affect both fares and services, even though Southdown's profits may remain no more than reasonable; it is sufficient for the purposes of [s 2(1), Competition Act] that there was a course of conduct that has or was intended to have the effect of restricting or distorting competition, whatever the effect on profitability' (MMC, 1993c, para 6.26).

Concluding that the Act had been breached the MMC recommended that Southdown be restricted in its fare increases and in the frequency of services for two years after the date of the report. Although the MMC considered asking for an undertaking that would have bound Southdown to keep in place any fares that it introduced in the face of possible or actual entry in the future if the entrant then left the market (MMC, 1993c, Appendix) it decided not to pursue this matter.

#### Raising or creating barriers to entry other than by predation

##### VERTICAL RESTRAINTS

The question of the extent to which market structure itself can be anti-competitive is a difficult one, and in part reflects the structure–conduct–performance, or performance–conduct–structure Harvard/Chicago debate. The issue is particularly debated in competition law in relation to vertical restraints, which are viewed in some quarters as anti-competitive, but which in many regimes are treated with a degree of leniency, although this may be tinged with suspicion. Vertical restraints, ('VR's), have been defined by Dobson and Waterson as situations 'whereby contractual arrangements between suppliers (manufacturers) and distributors (retailers) extend beyond simple arms-length pricing' (1996, v). In recent years both the OFT and the EC Commission have published papers examining the issue (Dobson and Waterson, 1996; European Commission, 1997), and in October 1998 the EC Commission published its proposals for an amendment to the mechanism for dealing with vertical restraints under article 85 EC. As Dobson and Waterson (1996) demonstrate VRs may be introduced (usually but not exclusively from upstream) in order both to increase the monopoly reward, and to increase barriers to entry or stifle competition. As with several other areas the debate is one in which the Chicagoans, headed by Bork, stand against other industrial economists and regulators. Dobson and Waterson are convinced that 'the material does *not* support the view, argued most vociferously by Bork, and associated with the so-called Chicago School, that all vertical restraints should be legal' (1996, v). The issue of the extent to which the vertical integration in the travel industry operates against the public interest was central to the inquiry considered in Chapter 7, below, and some further aspects of the VR debate are considered in that chapter.

<sup>10</sup> This followed a Competition Act reference and OFT report (OFT, 1992a).



In *cinema advertising* (MMC, 1990b) one of the concerns of the OFT when the reference<sup>11</sup> was made was that the link between Rank Screen Advertising (RSA) and the rest of the Rank organisation, which had a strong involvement in film distribution, was such as to inhibit independent exhibitors from taking the services offered by Pearl & Dean. Further, RSA had exclusive access to the Odeon cinema chain, also part of the Rank Organisation, accounting for 17% of the market, and had contracts with the Cannon chain accounting for around 30% of the market that ran for 14 years. The offering of substantial discounts, which were alleged to be predatory in that they were so significant as to be uneconomic for RSA, to advertisers if they did not place adverts on screens under contract to Pearl & Dean reinforced the exclusion. The MMC concluded that there was no evidence that the Odeon chain benefited from being part of the Rank Organisation, the various companies within the group operating at arms' length. The influence that Rank exercised over film-distribution was felt not to be sufficiently significant to deter independent screens from taking the service offered by Pearl & Dean; and that the long-term contracts with Cannon were won as 'a result of competition and [RSA] has no reason to expect criticism for this achievement' the length of the contracts arising at the request of Cannon (MMC, 1990b, paras 9.36–9.42). In conclusion the MMC found, therefore, that 'neither the practice of negotiating long-term contracts nor RSA's relationship with Odeon are facts which operate, or may be expected to operate, against the public interest' (MMC, 1990b, para 9.45).

The issue of 'freezer exclusivity' (the supply of freezer cabinets to retailers of impulse-ice cream on condition that only the supplier's ice cream be stocked in the cabinets) was considered by the MMC in *Ice Cream* (MMC, 1994b).<sup>12</sup> The MMC concluded that, in a market with perhaps as many as 1,000 suppliers, one scale monopoly existed in favour of Birds Eye Wall's Ltd (BEW), and a complex monopoly in favour of BEW, Nestlé UK Ltd and Mars UK Ltd. The first two had an acknowledged policy of operating freezer exclusivity, and Mars' insistence upon full-range stocking in return for the provision of a freezer achieved something very similar. The MMC recognised that this practice was part of an effective distribution system, which was particularly important as 'demand is not only seasonal, but also subject to extreme short-term fluctuations as the weather changes' (MMC, 1994b, para 1.3) but addressed the concern that the system might also operate so as to raise barriers to entry, in particular where a retailer had room for only one freezer and would therefore be faced with a choice of either buying and maintaining his own freezer or of being tied to one product range, foreclosing his outlet to other suppliers. In this case the MMC considered the argument of some suppliers and the Consumers' Association that consumer choice necessitated the removal of this practice but was not persuaded that the practice operated against the public interest. In particular the MMC was

'not convinced that the uniform adoption of retailers' own cabinets would itself significantly improve choice for consumers: the range of products stocked is likely to be limited by space constraints, and retailers may still prefer mainly to stock one manufacturer's products, given, for example, ease of supply and invoicing arrangements' (MMC, 1994b, para 9.54).

Dobson and Waterson are of the opinion that the checklist they propose (1996, chapter 5) 'would suggest a strong case for investigation of this market on the grounds of detriment to the public interest'. As will be seen in Chapter 7 the OFT and MMC have considered vertical integration in the context of the travel industry, requiring greater transparency of the industry.

<sup>11</sup> Under the Fair Trading Act 1973, ss 49 and 50, following a complaint made to the OFT by Pearl & Dean Ltd to the effect that it had suffered as a result of various unfair practices engaged in by Rank Screen Advertising.

<sup>12</sup> The practice was considered almost contemporaneously by the Irish Competition authorities and by the EC Commission. For comment see: Robertson and Williams (1995); Sibree (1995); and Maitland-Walker (1995). The MMC had previously considered this market in *Ice Cream and Water Ices: a report on the supply in the United Kingdom of ice cream and water ices* (Cmnd 7632, August 1979).



## CONTROL OVER AN ESSENTIAL FACILITY, PROPERTY RIGHTS AND INTELLECTUAL PROPERTY

The most extreme example of the erection/maintenance of barriers to entry dealt with by the OFT occurred in its investigation into the refusal of the Southern Vectis Bus Company to allow its competitors access to Newport Bus Station, on the Isle of Wight, with the exception of those operators who had made such arrangements prior to October 1986 (OFT, 1988b).<sup>13</sup> It is rare for the ‘essential facilities’ doctrine to be considered under general UK competition law, although it is fundamental to the ‘special sector’ regulation.<sup>14</sup> In this case the barrier was both one of cost, and, in all likelihood, of public sector control. As the OFT noted:

‘A new bus operator ... will not wish to duplicate the facilities of a bus station owned and operated by a competitor since this is likely significantly to increase the costs of entry, and in any case may well be impractical in terms of planning permission and site availability’ (1988b, para 3.6).

Following its own survey and enquiries the OFT rejected the argument put forward by Southern Vectis that there was no capacity at the station that would permit the entry of other operators, and concluded that the conduct pursued constituted a course of conduct within the meaning of the Competition Act 1980. In the present case the OFT was concerned that the effect of the policy would be to permanently exclude effective competition, the presence of which would likely switch revenue from the incumbent to the entrant. The OFT did not consider consumer welfare in the report, and made no comment as to the likelihood of one effect of the policy being to maintain higher prices than would pertain under competitive conditions, but it is a reasonable assumption that prices would fall where a direct competitor entered the market.

In *Cross-Solent Ferries* (MMC, 1992a) a similar situation relating to access to ports was considered. Here the MMC noted that the relevant statutory regime served to set conditions under which access to certain classes of ports would be granted to operators (by virtue of the Harbour Docks and Pier Clauses Act 1847, s 33 and the Harbours Act 1964, s 27), but pointed to a successful recent entrant as evidence that even private ownership of such facilities by an incumbent did not create an absolute barrier to entry.

Property rights in both intellectual property and tangible property may be used to restrict competition. As the OFT has made clear:

<sup>13</sup> The investigation was carried out under s 3, Competition Act 1980. This remains the most requested of all of the OFT’s Competition Act reports. The absence of barriers to entry in the deregulated bus market is a powerful incentive to competition, as the OFT had noted in earlier reports into the sector, see e.g. *South Yorkshire Transport Limited*: ‘Since deregulation there are few *formal* barriers to entering the market for local bus services. Provided a bus operator complies with safety requirements and holds a Public Service Vehicle Operators Licence, he has only to provide the relevant Traffic Commissioner with details of the service at least 42 days before it is due to start. Barriers to entry which are important in other industries (e.g. the need to attain certain levels of economies of scale) seem to be less important in markets for the provision of local bus services.’ (OFT, 1989c, para 2.8).

<sup>14</sup> In particular to the regulation of the previously public-owned utilities, and to telecommunications. As regards the operation of bus stations a distinction was drawn by the Transport Act 1985 between those which had been publicly owned, and those in the private sector. The former were governed by s 82 of the Act, which prohibited discrimination against any service; the latter were affected by s 116(1) of the Act which brought within the scope of general competition law all bus stations, irrespective of ownership. In the 1984 White Paper on Buses (Cmnd 9300, July 1984) it was noted that: ‘If competition is to flourish, no operator should be in control of a bus station of a size or strategic position which would allow him to gain an unfair advantage by excluding other operators. The Government believes that major bus stations should be operated whether in private or public ownership on a commercial basis under arrangements which will provide for all operators to have equal opportunity of gaining access to them’ (at para 5.16). For the ‘essential facilities’ doctrine in general see Areeda (1990) and Furse (1995b). With regards to *Southern Vectis* it could equally be argued that the issue was one of the way in which the use of private property rights could be controlled if their use was considered to be anti-competitive, and the OFT drew in part on the *Ford Motor Company* (MMC, 1985).



‘it has been established that where the effect is to restrict, distort or prevent competition, the manner in which property rights are exercised may amount to an anti-competitive practice as defined in the Competition Act 1980’ (OFT, 1988b, para 7.4).

There will, however, be a presumption against such a finding, the property owner ordinarily ‘can expect to have the freedom to use it as he sees fit, and he would not expect to allow competitors to use the property if that would be damaging to his own commercial interests’ (OFT, 1988b, para 7.4).

The MMC had raised concerns about the potential of the exploitative use of intellectual property rights in *Ford* (MMC, 1985) in which the company was found to be in breach of the Act by refusing to grant licences to any person to manufacture or sell in the UK any replacement body part. Effectively this gave Ford a complete monopoly over the market. The MMC concluded that it did not have the power to order the granting of a licence to manufacture or sell a copyrighted item. Although it might be considered unfortunate for the MMC to have to consider conduct that it felt to be incapable of rectifying the changes in the law recommended by the MMC, introduced in the Copyright Designs and Patents Act 1988, s 144, may have a greater long-term impact than would be the case where a response emerges in one instance to a specific investigation.<sup>15</sup> Further, Ford agreed to allow licences to applicants – subject to a royalty of up to 2% on the net sales price. The analysis in this and similar cases has been attacked by Liesner and Glynn (1987). Assuming good, if not perfect, consumer knowledge the additional cost of spare parts for Ford cars would be factored in as part of the purchase cost, which would include not only the initial outlay but also expected running and maintenance costs, and would, *ceteris paribus*, raise the cost of Ford cars relative to cars where spare parts were cheaper. However, consumers would not be likely to switch immediately to marginally cheaper models produced by other manufacturers where they do not have the information to perform the calculations.

In *BBC/ITP* (MMC, 1985) the practice concerned the refusal of the BBC to grant licences to use its copyrighted programme listings to third parties. Again this was not a matter that could have been remedied by the MMC, although it found that the practice did not operate against the public interest. This too was later dealt with under s 144 of the 1988 Act. Note, however, that the EC did not support this conclusion when it re-examined the issue.<sup>16</sup>

#### PRICE-DISCRIMINATION

Price-discrimination is normally taken as evidence of considerable market power, and serves both as an exclusionary tactic, and as an exploitative one in which consumer surplus is replaced by super-normal profits. For price discrimination to operate successfully it presupposes a large

<sup>15</sup> S 144 of the Copyright, Designs and Patents Act provides, in part, that:

‘(1) Where the matters specified in a report of the Monopolies and Mergers Commission as being those which in the Commission’s opinion operate, may be expected to operate or have operated against the public interest include-

(a) conditions in licences granted by the owner of copyright in a work restricting the use of the work by the licensee or the right of the copyright owner to grant other licences, or  
(b) a refusal of a copyright owner to grant licences on reasonable terms.

the powers conferred by Part I of Schedule 8 to the Fair Trading Act 1973 (powers exercisable for purpose of remedying or preventing adverse effects specified in report of Commission) include power to cancel or modify those conditions and, instead or in addition, to provide that licences in respect of the copyright shall be available as of right.

(2) The references in sections 56(2) and 73(2) of that Act, and sections 10(2)(b) and 12(5) of the Competition Act 1980, to the powers specified in that Part of that Schedule shall be construed accordingly.

<sup>16</sup> The EC has also taken action against such practices. See e.g. *RTE v. EC Commission* case T-69/89 [1991] 4 CMLR 586 and *BBC v. EC Commission* case T-70/89 [1991] 4 CMLR 745.



element of control of the market place on the part of the supplier. Price-discrimination will normally be accepted by competition authorities only where it reflects genuine differences in costs – for instance of packaging and delivery costs in supplying in bulk as opposed to small quantities. In *Contraceptive Sheaths* (MMC, 1974) it was considered that London Rubber Co were preventing access to the market by creating very low price brands so as to prevent competitors from getting a foothold.

#### PREDATORY SUPPLY INCREASES

*Ceteris paribus* an increase in supply leads to a fall in price and, in competitive situations is often associated with predatory pricing. However, where the market is a monopolistic one it may be possible to increase supply and to hold prices at pre-increase levels. In the deregulated bus sector this strategy has been particularly in evidence as companies have taken advantage of the service and schedule registration rules to timetable extra services ('fillers') to reduce the projected market share of entrants (see in particular Chapter 5 below). This practice was first formally considered by the OFT in *Highland Scottish* (OFT, 1989b) although by default the practice had been noted in *West Yorkshire*, the absence of such a practice suggesting that the incumbent had not engaged in predation (OFT, 1989a). In *Highland Scottish* the incumbent increased its route mileage by 61% in direct response to the entrant (OFT, 1989b, para 2.6). The OFT noted that:

'the increase in its total mileage in response to [the entrant] was very substantial. Although unit costs fell in 1989, the effect of the increase in mileage was that the total cost of operating local services in Inverness rose by around one third in the first five periods of 1989 ... Highland's mileage almost doubled ... following Traction's entry despite no change in its registered frequency of services' (OFT, 1989b, para 5.27).

and concluded that 'Highland's regular and persistent use of two extra buses ... is some evidence of predatory intent', and that 'an expansion on this scale suggests predatory intent' (OFT, 1989b, paras 5.23 and 5.24). The OFT found that, *inter alia*, this increase in service had the effect of restricting competition, and that s 2(1) of the Competition Act 1980 therefore applied. In subsequent investigations (e.g., OFT, 1989c) into the bus market the extra provision of bus services has been a regular feature alongside price cuts.

#### *Exploitative practices*

Exploitative practices are courses of conduct which arise out of the advantage conferred to an incumbent by virtue of its monopoly position. These are more likely to be examined under the Fair Trading Act, by way of a s 48 or 49 MMC investigation than by way of a Competition Act reference, although the latter is not unknown. The reaping of supernormal profits, by way of 'excessive' prices is the most discussed of such practices.

#### Excessive pricing and super-normal profits

The charging of *excessive* prices is, by definition, against the public interest, although the analysis is fraught with complications. If it is an issue to which the MMC has frequently turned (e.g., 1992a; 1993b; 1994c) that is in part because this is an area in which there is consumer awareness, and in which there is no short term gain to the consumer. The MMC has not adopted a standard formulation to be applied in the determination of excessive pricing (hence making it harder to



predict the agency's response in future cases): the factors that may be considered include costs for the same product charged by competing firms, or in other similar economies, or the firm's overall profit levels. The MMC expects firms to have a profit margin large enough to cover the costs of marketing and distribution and to provide a reasonable surplus. What is a reasonable surplus may, however, vary from industry to industry. Where entry barriers are high the MMC is likely to be more concerned about excessive pricing than if they are low. In *Tampons* (MMC, 1980) the MMC felt that the market could regulate itself. Barriers to entry were low and if existing firms made super-normal profits this would be an encouragement to new firms to enter the market.<sup>17</sup> In 1986, in relation to the same market the MMC concluded that higher than average industry profits could be attributable to factors such as superior management, organisation, innovation, and production (MMC, 1996b).

In its third report into petrol (MMC, 1990a)<sup>18</sup> the MMC addressed the public interest issues under seven main heads, the level of prices appearing at the top of the list.<sup>19</sup> Overall the MMC, recognising the level of public concern over some of the features of the market found 'much of the concern misplaced ... this is a competitive market' (MMC, 1990a, para 1.1).<sup>20</sup> A central concern was that parallel pricing was the result of collusion. The MMC found that 'this pattern of price changes is, however, a response to commercial pressures that are common to all and we found no evidence to suggest collusion among any wholesalers' (MMC, 1990a, para 1.9). As far as the general level of prices was concerned the MMC surveyed wholesale Rotterdam prices, and European pump prices, and concluded that the UK prices were not significantly out of line with these. This conclusion was reinforced by a study of industry profitability, which found 'it below the average level of profitability in the United Kingdom industry over the period' (MMC, 1990a, paras 1.7–1.14) and the MMC concluded (at para 1.14) that its 'results indicate little scope for price reductions'.

In *Soluble Coffee* (MMC, 1991a) the MMC was asked to investigate following an investigation conducted by the OFT which was undertaken in turn at the instigation of the Minister for Agriculture, Fisheries and Food. The central issue to be considered by the MMC was 'whether the profits and prices of Nestlé, the scale monopolist, result from its exploitation of its monopoly position in a market where there is inadequate competition, or reflect its success in conditions of effective competition' (MMC, 1991a, para 7.52). Nestlé's return on its capital in 1989 was 114%, a figure that was far higher than the industry average, but the MMC accepted that this was overstated due to the age of the company's fixed assets (MMC, 1991a, para 7.53–7.62). On a more realistic estimate the MMC accepted that a rate of around 80% was achieved. The crucial factor was that the MMC found 'no evidence of "anti-competitive" practices by Nestlé' and that 'Nestlé's competitors tended to speak highly of Nestlé's efficiency and reputation for fair business practices' (MMC, 1991a, para 7.63). The conclusion was further influenced by the fact that over a dozen suppliers produce over 200 types of soluble coffee.

The MMC received nearly 600 letters of complaint about the fare levels imposed by the ferry companies operating between the Isle of Wight and the mainland when it was called upon to investigate that market in 1991 (MMC, 1992a).<sup>21</sup> Evidence was produced to show that some of the fares were 'among the most expensive in the United Kingdom', (MMC, 1992a, para 7.29)

<sup>17</sup> This conclusion has been criticised and while there has been entry to the market since the report the MMC itself noted in 1996 that prices 'have increased in real terms over the last ten years, and we have seen no convincing evidence of strong price competition' (MMC, 1996b, para 1.4).

<sup>18</sup> The MMC had previously reported in 1965 and in 1979. Following the 1965 report undertakings from various petrol companies were accepted in 1966 in line with the MMC recommendations (see Annex 2.2 of the 1990 report).

<sup>19</sup> (1) price levels (2) profits (3) agreements between wholesalers (4) wholesaler agreements with retailers (5) wholesaler ownership of retail sites (6) wholesaler control over prices (7) barriers to entry.

<sup>20</sup> This conclusion has been supported by Dobson and Waterson (1996, 61).

<sup>21</sup> At para 1.3 the report refers to 'almost 600 letters of complaint', at para 7.16 to 'about 500 letters'.



although, as it has consistently done, the MMC was not prepared to consider these price levels in isolation, stating that ‘the level of fares must be considered in relation to the cost of providing services and to the profitability of these services’ (MMC, 1992a, para 7.30). Here however, there were additional concerns because the strength of the major operator, Wightlink, was such that its competition could not be ‘characterised as strong, or sufficiently effective in itself to ensure that Wightlink [was] unable to abuse its monopoly position’ (MMC, 1992a, para 2.23). Wightlink was the only operator on the routes which was profitable, the return on capital employed amounting to around 12% – ‘substantial and towards the upper limit of what may be regarded as reasonable for a company enjoying such a strong market position’ (MMC, 1992a, para 7.54). In the analysis this level of profitability was viewed as an incentive that would ‘enable competition to thrive’ (MMC, 1992a, para 7.71), although the lack of confidence of the MMC that this would be the case was reflected in the concern that the position might need to be monitored and reconsidered in the future.

In *Recorded Music* (MMC, 1994c) the MMC was asked to investigate the market following various criticisms of high prices charged for Compact Disc musical recordings (CDs). In particular the House of Commons Select Committee on Heritage had expressed concern that the price differential between CDs and vinyl long-playing records was excessive, and that prices charged in the UK were higher than those charged in similar economies, such as America. The MMC commissioned comparative studies of prices in the reference goods in the USA and the UK from BMRB, and in a range of other goods from Management Horizons. Although the MMC found that there were two monopoly situations (a scale monopoly in favour of WH Smiths/Our Price, and a complex monopoly in favour of the five major record companies) (MMC, 1994c, paras 2.48 and 2.44), and acknowledged that prices of CDs were in some cases higher in the UK than in the USA it did not attribute the higher prices to anti-competitive actions taken by the firms to exploit their monopoly position. The ‘strong competition’ existing between the UK record companies and retailers led to the MMC concluding ‘that the prices for recorded music in the UK are set at levels determined by effective competition’ and that ‘artists [have] adequate bargaining ability to negotiate the terms of their contracts’ (MMC, 1994c, para 2.184).<sup>22</sup>

The MMC has been prepared to make recommendations about the imposition of price controls. In 1992 it recommended that Bryant & May, the market leader in the market for branded matches, should not implement any price increase for two years, and thereafter should be required to operate a RPI minus X constraint.<sup>23</sup> This followed a finding of very high profits (28% on turnover in 1990) and a finding that the operation of an aggressive discounting scheme, minimum stocking requirements and promotional exclusivity operated against the public interest.

In *Contact Lens Solutions* (MMC, 1993b)<sup>24</sup> the MMC found that the pricing policy of Allergan, a scale monopolist with 38% of the market, ‘constituted a step taken for the purpose of exploiting the monopoly situation in its favour’ which operated against the public interest (MMC, 1993b, para 8.152). The MMC itself recognised that the high profitability of the company was one

22 The major concerns expressed by the MMC, and one area in which it was recommended that action be taken by the DGFT related to the compiling and display of charts of record sales. WH Smiths in particular tended to display a chart based on sales in its store, which would not be the same as that of the national chart compiled for the industry by Gallup (and later Millward Brown), and for which record companies might be charged for inclusion of their titles. The MMC recommended that any retailer displaying charts differing from the national chart should make clear at the point of display the basis on which they have been compiled’ (paras 2.179 – 2.181).

23 I.e., the price would not be allowed to increase by more than the Retail Prices Index less a specified factor. See *The Supply of Matches and Disposable Lighters: A report on the supply for retail sale in the United Kingdom of matches and disposable lighters* (Cm 1854, March 1992).

24 The company’s lawyers had pointed to the fact that there were only three cases in which a form of price control had been recommended since 1980, and that the cases heard since 1980 ‘were consistent with the MMC being reluctant to recommend price control’ (at paras 6.48-6.49).



reason why the inquiry was set up: in the five years preceding the inquiry Allergan's profits had been 'well above average, even for pharmaceutical companies' (MMC, 1993b, para 8.147) and the MMC believed that these profits arose in part from Allergan's ability to partition the market, offering discriminatory discount rates to various categories of customers – a strategy that would be successful only if pursued by a firm with a degree of monopoly power (MMC, 1993b, paras 8.128–8.152). In the downstream retailing market the MMC found that Boots also enjoyed a scale monopoly, using this as a base from which to pursue an aggressive purchasing policy, the benefits of which were not passed onto the eventual consumer (MMC, 1993b, paras 6.168–8.191). The MMC's primary recommendation was that the regulatory regime under which contact lens solution was sold should be changed so as to allow more retailers into the market, some of whom would have significant countervailing purchasing power (MMC, 1993b, paras 8.213–8.236). If these changes could not be made ahead of the full implementation of the EC Directive on Medical Services the MMC recommended that 'fall-back remedies' should include the imposition of an RPI minus X price control on Allergan. In relation to Boots the MMC's fall-back recommendation was that they should be constrained to a price level at least 10 per cent below the products' RRP. The danger that suppliers would react by raising the RRP would in turn be alleviated by the control on Allergan's prices (MMC, 1993b, paras 8.228–8.233).<sup>25</sup> In *Classified directory advertising services* (MMC, 1996c) price reductions were also recommended. This matter is addressed further in Chapter 6.

#### Full-line forcing, tie-in sales, and line discounts

In full-line forcing a customer is required to accept all or part of a supplier's range and cannot purchase selectively; tie-in sales tie the supply of one product to another. Both were considered by the MMC in its 1981 report *Full-Line Forcing and Tie-In Sales* (MMC, 1981a). These practices raise concerns where the effect is to allow a producer to extend market power from a market in which it is dominant to one in which it is not. The MMC's general view is that such practices are neither 'consistently harmful, beneficial or neutral but [depend] on the circumstances' (MMC, 1996b, para 2.35).

The MMC has examined the practice of tying sales of toner to the supply of photocopiers on two occasions (MMC, 1976; and MMC, 1991c). Following the first report Rank Xerox Ltd, which had around 90% of the market, gave a number of undertakings to the Secretary of State in 1978. In 1983 the company was released from many of these following altered market conditions, and in 1988 the company sought release from the remainder of the undertakings.<sup>26</sup> In seeking a release from this undertaking the company argued that toner tie-in was a widespread industry practice, and that the company was unfairly restricted by the undertaking. In its review of the

25 In this instance the MMC recommended that X would need to be at least 5 in order to bring about any substantial benefit to the consumer. The MMC recognised however that this fall-back position was generally unsatisfactory. At para 8.233 it commented that 'these fall-back remedies would further distort the market ... their value might erode over time as the parties adapted their behaviour to the new situation ... the regulatory changes we have identified ... are the only satisfactory way of dealing with the adverse effects we have found'.

26 The undertakings at that time were, in part, as follows:

#### 'Toner'

We will give to all customers, before entering into agreements with them, the option of purchasing toner separately, either from ourselves or from another supplier.

We will show on our Rental and Service Agreements our current retail prices for toner and specify in such Agreements the terms on which customers may change to separate purchase of toner.

We will show the amount of the charge for toner on the rental invoices of all customers who do not elect to purchase toner separately.

We will inform the [DGFT] of any proposed changes to those terms of our Rental and Service Agreements that relate to the purchase of toner.'



situation the OFT identified a number of practices that it felt merited further review by the MMC. The MMC did not entirely accept arguments made by some suppliers that tying of toner to the supply of copiers was justified on technical grounds, but did recognise that manufacturers had ‘a legitimate interest in seeking to ensure that suitable toner is used in their machines’ (MMC, 1991c, para 9.118). The MMC was swayed by the level of competition in the market, and by the fact that, where toner was tied to the copier the package as a whole had to be competitive, the cross-over being made clear when the MMC noted that ‘the supply of toner is subject to competitive forces as a result of the strong competition which exists in the supply of [copiers] themselves’ (MMC, 1991c, para 9.149). Customers who responded to an MMC survey did not, on the whole, object to the practice. The MMC’s view was the public interest would not be jeopardised were Rank Xerox to be released from its earlier undertaking (MMC, 1991c, para 9.157). In 1997 the OFT, while recognising that matters had improved somewhat, announced that it remained unhappy with several industry practices (OFT, 1997a).

When it considered the range-stocking requirements imposed by Bryant & May the MMC found that ‘the existence of such provisions in agreements in each case restricts and distorts competition, as customers are likely to buy less matches and disposable lighters from Bryant & May’s competitors than they would do otherwise’ (MMC, 1992b, para 7.50). The barriers to entry that could be raised by these requirements were noted.

In 1996 the MMC published its report into the practice of Tambrands Ltd, which has a market share of around 60% in the UK and owns the Tampax mark which was described in the report as a ‘must-stock’ item, of offering discounts to a selective group of retailers in return for the acceptance of a condition requiring the retailer to stock the full range of Tampax (MMC, 1996b).<sup>27</sup> This was in response to a reference made under the Competition Act following a complaint made by Somerfield Stores Ltd. Tambrands rejected the ‘emotive’ description of this practice as ‘full-line forcing’. The OFT had been concerned that the requirement to stock across the range could reduce shelf space available to competitors in the affected outlets and raise barriers to entry. Before the MMC Tambrands acknowledged that ‘it was seeking to get the broadest possible distribution of its product range ... and that the range-stocking requirement could be expected to benefit new products’ (MMC, 1996b, para 2.29). The MMC distinguished between the adverse factors noted in the 1981 report and factors present in this instance, concluding that Tambrands’ conduct was not anti-competitive within the meaning of s 2(1) of the Competition Act.<sup>28</sup> In *Fine Fragrances* (MMC, 1993d) the MMC found that the imposition of range-stocking criteria and minimum purchasing requirements did not operate against the public interest: while a number of deleterious effects were postulated the evidence supporting their existence was not strong, and the parties to the reference had already revised their restrictions in the light of European Community law (MMC, 1993d, paras 8.160–8.175).

An ancillary issue arose in the MMC’s investigation into the practice of television broadcast companies using their channels and programmes to promote their own products (MMC, 1992c). The reference followed an inquiry, initiated by the Secretary of State for Trade and Industry, conducted under the chairmanship of John Sadler<sup>29</sup> in the course of which the BBC’s cross-promotion in particular was criticised. The MMC found that the value of the free airtime given by the BBC to its commercial arm, BBC Enterprises, amounted to as much as £20m in 1990/91.

<sup>27</sup> The MMC had twice previously considered the tampons industry (MMC, 1980a; 1986a).

<sup>28</sup> In particular the MMC noted that:

‘There is, for example, no element of exclusive dealing, or regarding any company specifically for excluding other competitors’ products. Nor is there any refusal to supply if the full (or agreed) range is not stocked’ (1996b, para 2.38).

<sup>29</sup> *Enquiry into Standards of Cross Media Promotion* (Cm 1436, 12 March 1991).



The bulk of this related to promotions of magazines that were linked to BBC TV programmes.<sup>30</sup> The MMC found this practice to be against the public interest, and recommended that ‘broadcasting of moving trails ... should be prohibited, but that still trails by announcement over the end credits of a programme or over a single slide should be allowed’ (MMC, 1992c, para 7.186 and generally paras 7.178–7.190) and that conditions should be attached to the use of these.

#### Distribution systems and refusal to supply

The MMC has considered both exclusive and selective distribution systems. Neither are conditional upon a substantial amount of market power, although as their success is dependent upon a level of brand/product-differentiation they are more likely to be found in such market structures. The anti-competitive effects of such systems may be to allow differential and/or ‘excessive’ pricing and to erect barriers to entry by shutting off outlets to entrants. Critics of restrictive competition policies have argued that distribution should not be a matter of concern in a regulatory system with efficiency as its goal.<sup>31</sup> The MMC, however, is concerned to ensure that distribution be as wide as possible, although, in general, restrictions on the appointment of distributors will be accepted if there are objective reasons for so doing, e.g.: need for specialised service; need for certain level of turnover to make the business viable; need for safety standards to be met.

Refusal to supply has been considered generally by the MMC twice (MMC, 1970; and 1978). Writing after the first Competition Act investigation had taken place Sharpe (1983, 36) noted that ‘judging by the volume of complaints received by the [OFT] refusal to supply is among the most pressing problems facing the United Kingdom competition authorities’. The refusal to supply that was considered in *Raleigh Bicycles* (OFT, 1981; MMC, 1981) was connected to the operation of selective distribution systems, as was also the case in *Black and Decker* (MMC, 1989b). In both cases manufacturers of leading brands refused to sell to a group of well-known retailers, including B&Q and Argos in the latter case, on the grounds that they were known for cutting prices to levels lower than those generally holding. The MMC made it clear that the type of restriction that will be accepted is related directly to the product in question. In *Black & Decker* the company (B&D) relied in part upon s 13 of the Resale Prices Act 1976, the operation of which was criticised by the MMC.<sup>32</sup> B&D also argued that its action, which had the effect of increasing the number of outlets selling the company’s products,<sup>33</sup> was pro-competitive and not restrictive. One of the key elements of the company’s competitive strategy was to maximise

30 At the time BBC Enterprises had a market share in consumer magazines of between 7%–10%, but in specialist areas market shares were higher, rising up to 90% in relation to food and cookery magazines (MMC, 1992c, para 1.6).

31 There is a large literature on the question of whether vertical arrangements should be of any concern to competition authorities, and the view that they should not be is in the ascendancy before the American courts (see e.g. *Continental TV Inc et al v GTE Sylvania Inc* 433 US 36 (1977)). In *Sylvania* the views of Bork and Posner were given particular prominence.

32 Section 13 provides, in part, that:

‘(1) It is not unlawful ... for a supplier to withhold supplies of any goods from a dealer, or to cause or procure another supplier to do so, if he has reason to believe that within the previous twelve months the dealer or any other dealer to whom the dealer supplies goods has been using as loss leaders any goods of the same or a similar description, whether obtained from that supplier or not.’

The MMC noted that ‘there are considerable difficulties about section 13 of the RPA’ and recommended ‘that the provisions [of s 13] be reviewed’ (at para 1.7). The section stands although will fall with the repeal of the RPA on 1 March 2000.

33 Nine of the largest retailers had threatened to cease selling the products as they could not match the prices being offered by competitors who sold the goods at promotional prices. Following B&D’s action in refusing to supply if the products were going to be sold at low margins a trend to declining numbers of outlets was halted.



volume 'on the basis of a uniform and equitable pricing structure' (MMC, 1989b, para 4.2). The MMC disagreed, holding that 'it is for the retailers to determine retail selling practices and prices and that a return, even in a limited way, to resale price maintenance would reduce competition' (MMC, 1989b, para 1.3). In particular the MMC was concerned that a continuation of the practice would 'inevitably maintain and establish a minimum price [for the products in question] in all retail outlets ... this effect of the practice runs counter to the continued development of an innovative and competitive retail sector' (MMC, 1989b, para 6.75). In its 1978 report, *Refusal to Supply*, the MMC had concluded that there are three situations in which refusal to supply may be against the public interest: (i) where it involves refusal to supply known price cutters; (ii) where it is a response to a boycott threatened by other distributors and (iii) where the supplier does not operate in a competitive environment. The first two of these were factors in *Black and Decker* and the first in *Raleigh*. The MMC also found that the third factor was present in both cases, but this conclusion has been criticised by Utton (1994) who argues that whilst the companies enjoyed large market share they did not enjoy great market power.<sup>34</sup>

The practice was also considered in *Fine Fragrances* (MMC, 1993d) in which the MMC accepted that, the reference products being marketed as luxury goods, 'the suppliers need to be able to control their distribution in order to protect the brand images which consumers evidently value' (MMC, 1993d, para 1.6). However, the refusal to supply retailers not meeting the criteria set by the fragrance houses in whose favour the monopoly position existed was considered to constitute 'uncompetitive practices for the purpose of exploiting and maintaining the complex monopoly situation' (MMC, 1993d, para 8.63). Particular attention was paid to the system under which recommended resale prices were set<sup>35</sup> and while the practice was found to be anti-competitive, in that it resulted in reduced price competition among retailers, the MMC did not find that this operated against the public interest, in particular as departures from the recommendations were not uncommon.<sup>36</sup> The qualitative criteria by which retailers were excluded from the distribution system were also felt to be anti-competitive, but not to operate against the public interest. Here the MMC referred to, and to an extent relied on, the Decisions taken by the EC Commission in relation to YSL Parfums and Parfums Givenchy.<sup>37</sup>

Exclusivity and minimum-stock requirements (see also 'full-line forcing and tie in sales' above) were factors present in the distribution system operated by Coca-Cola & Schweppes Beverages Ltd (CCSB) which was considered by the MMC in *Carbonated Drinks* (MMC, 1991b) (which may also be considered under a vertical restraint analysis, and is dealt with by Dobson and Waterson (1996, 62)). There the MMC condemned the operation of the requirements by the scale monopolist as a feature that contributed significantly to the already high barriers to entry (MMC, 1991b, paras 10.69–10.95). In particular the fact that distributors had to cease selling competing products in order to qualify for certain types of favourable terms distorted the market

34 In *Black & Decker* the MMC characterised the company as having 'considerable market power', pointing in particular to the patented 'Workmate' and to the fact that many retailers considered B & D's range to be 'must stock' items; B & D had argued that it had no market power (MMC, 1989b, paras 6.40–6.41). Sharpe (1983) has also criticised the view that Raleigh had market power, describing this as an 'astonishing' conclusion (1983, 58). Sharpe was concerned too to note the problems that would arise were firms required to enter into imposed contractual situations (to supply products) following recommendations made by the MMC. His view was that 'the appropriate response of the authorities in the absence of any clearly identified detriment to consumers ought to be reluctance to interfere in the face of such long-standing and complex relationships' (Sharpe, 1983, 67).

35 Previously considered by the MMC in 1968 in *Recommended Resale Prices: a report on the general effect on the public interest of the practice recommending or otherwise suggesting prices to be charged on the resale of goods* (HC 100, February 1969).

36 Recommended resale prices should be distinguished from resale price maintenance, and the MMC found no evidence to suggest that the fragrance houses sought to maintain resale prices.

37 Commission Decision 92/33/EEC *Yves Saint Laurent Parfums* (1992) OJ L12/24; Commission Decision 92/428 *Parfums Givenchy system of selective distribution* (1992) OJ L236/11.



and the MMC felt that this would lead to a reduction in consumer choice and, therefore, to a rise in prices for the product generally.<sup>38</sup>

#### Miscellaneous

In the course of their investigations the OFT and MMC have dealt with many issues that were ancillary to allegations central to the report, but which still fell to be considered under the relevant legislation. Thus, in *Cross-Solent Ferries* (MMC, 1992a), for example, the MMC considered the quality of the service offered (alongside the more central issues discussed above). This issue, however, was dealt with in five paragraphs,<sup>39</sup> and no aspect of the service itself was found to operate against the public interest.

Restrictions on advertising, which limit competition within professions and limit the amount of information available to the public, have been condemned in a series of 1976 reports into accountants, solicitors in England and Wales, solicitors in Scotland, stockbrokers, veterinary surgeons, barristers and advocates, and in *Osteopaths* (MMC, 1989a). The MMC's view broadly has been that enunciated in its reports into solicitors:

'The public is well accustomed and is constantly exposed to a great deal of advertising of all kinds and ... we do not believe that advertising itself necessarily leads the public to take a sceptical view of the trustworthiness of those who supply the goods or services advertised. ... If misleading or extravagant claims were made this might lead to deterioration of the public's confidence in the profession; but in our view it is highly unlikely that the great majority of solicitors would advertise in this way, since they would recognise that inappropriate advertising was self-defeating. Nevertheless the possibility should be recognised and guarded against' (quoted in MMC, 1989a, para 3.6).

Thus, in *Osteopaths* the MMC recommended that advertising restrictions should be lifted, provided that any advertising should: conform to the British Code of Advertising Practice; not bring the profession into disrepute; and not exploit the lack of knowledge of the consumer (MMC, 1989a, para 1.5).

#### *Collusive practices and agreements falling short of merger*

While the major instrument to deal with collusion in the UK is the Restrictive Trade Practices Act 1976 the Fair Trading Act also applies where a 'complex monopoly' operates, as provided for in s 6(1)(c).<sup>40</sup> Characterised as a minefield for the unwary these provisions do not require the conscious parallelism of Article 85 to become operative. Rather, 'it is sometimes considered that the question of whether or not a complex monopoly situation exists is simply a jurisdictional test to determine whether a monopoly investigation should be undertaken'.<sup>41</sup>

Any form of parallel conduct may fall to be examined under these provisions but it is parallel pricing that has received the most attention. In 1973 the MMC published a report on parallel pricing generally, concluding that the practice led to 'a general weakening of the pressure on all

38 For a critique of the approach adopted see Brent (1993, 827–828).

39 The report runs to 125 pages.

40 The definition of complex monopoly is a matter of some difficulty. The test is set out in s 2 of the FTA (see the Annex).

41 See Brent (1993) and Rodger (1996).



sellers to maintain a high degree of efficiency'. The identification of parallel conduct is, in the absence of documentary evidence, difficult and its pursuit has resulted in some of the most complex of the MMC investigations (e.g., MMC, 1990a).

In 1989 the MMC was asked to consider whether it would be against the public interest for the Peninsular and Oriental Steam Navigation Company (P & O) to enter into an agreement with Sealink for the joint or co-ordinated supply of various cross-Channel car ferry services (MMC, 1989c). At the time the companies were prevented from operating such an agreement following undertakings made to the Secretary of State in 1979 in the light of previous reports into the sector. At the time the reference was made the companies were concerned as to the effect that the opening of the competing Channel Tunnel would have on their businesses and argued that the proposed joint service was 'the only way in which they would be able to provide effective competition to the Channel Tunnel' (MMC, 1989c, para 1.2). The traditional competitors accounted for approximately 75-80% of the relevant market, and the MMC's view was that competition between them had 'been to the benefit of passengers, by moderating fare increases, and encouraging improvements in quality of service' (MMC, 1989c, para 1.3). All of these benefits, the MMC felt, 'would be eliminated by the proposal' (MMC, 1989c, para 7.42). The MMC was particularly swayed by the difficulty of entry into the market, in which the dominant position of the two firms themselves could be expected to play a role, and did not accept the parties' contention that 'there would be sufficient competition from other sources – from other ferry services, by air, or from alternative types of holiday within the United Kingdom' (MMC, 1989c, para 7.44) to counteract the joint agreement. The MMC recommended that the proposal not be allowed.

### *Reports as precedent*

The value of reports as precedent is dealt with at various points throughout this work, both generally and in relation to specific cases. Neither the OFT nor MMC operates a system of strict precedent. However, past reports have value. While practitioners do not appear to rely on them as a guide to current decision making in any particular case they do turn to them as an indicator of how the MMC may deal with a particular matter.<sup>42</sup> As is shown in Chapter 5, below, the reports are read widely in relevant industries, and appear to have an impact on practices in those industries.

### UNDERTAKINGS AND ORDERS – THE FORMAL 'OUTCOME'

Following intervention by the OFT a company may offer to modify the conduct subject to scrutiny without any formal steps being taken. It is known that this happens on a regular basis, but such contacts are not widely reported. More formally undertakings may be sought following the conclusion of MMC reports under both the FTA 1973 (s 88) and the Competition Act 1980 (s 9), or an undertaking may be offered in lieu of a formal reference to the MMC (FTA 1973, ss 56A–56G, inserted by the Deregulation and Contracting Out Act 1994). Section 56A is in the following terms:

<sup>42</sup> See Chapter 8.



- (1) The Director may propose that the Secretary of State accept undertakings in lieu of the Director making a monopoly reference if—
- (a) he considers that a monopoly situation exists and that there are facts relating to the monopoly situation which may now or in future operate against the public interest,
  - (b) he intends, apart from the question of undertakings being accepted in lieu, to make a monopoly reference with respect to the existence of the monopoly situation and that the reference should be a monopoly reference not limited to the facts, and
  - (c) he considers that undertakings offered to be given by particular persons would be sufficient to deal with such of the relevant adverse effects of the monopoly situation as he thinks need to be dealt with.

Publicity requirements must be fulfilled before such a proposal may be made (s 56B), and once accepted undertakings must be published in an appropriate manner (s 56G). The DGFT has an obligation to 'keep the carrying out of an undertaking to which this section applies under review' (s 56E(1)), and may propose either the release of the company from the undertaking (s 56E(1)(a)), or the variation of an undertaking (s 56(1)(b)). Similar provisions exist in the Competition Act 1980 at s 4.

All undertakings are binding once made, and action may be brought by third parties injured by breach. The FTA 1973, s 93(2) for example provides that 'any person may bring civil proceedings in respect of any failure, or apprehended failure, of the responsible person to fulfil the undertaking'. Undertakings accepted under the Competition Act 1980 may be relied upon by third parties by virtue of the FTA 1973, s 93A(1)(c)). There are no reported cases of actions being brought on the basis of undertakings made under either Act.

Where undertakings cannot be negotiated orders may be imposed. The FTA 1973, s 56 makes provision for the appropriate minister to 'by order made by statutory instrument exercise such one or more of the powers [set out in Sch 8] as he considers it requisite to exercise for the purpose of remedying or preventing the adverse effects specified in the report'. The equivalent provision in s 12 of the Competition Act 1980 provides either for the Minister to order the submission of a plan from the offending company by which the adverse conduct may be brought to an end (s 12(3)) or, irrespective of this provision, for the making of an order to remedy any adverse conduct identified in the report 'to such extent and in such manner as he considers appropriate' (s 12 (5)). Sections 90–93 of the FTA 1973 apply equally to orders made under both Acts, and permit the investigation of any company which is subject to an order (in accordance with the Companies Act 1985) (s 92). While infringement of an order does not constitute a criminal act (s 93(1)) any person may 'bring civil proceedings in respect of any contravention of apprehended contravention of any such order' (s 93(2)) and 'compliance with any such order shall be enforceable by civil proceedings by the Crown for an injunction or interdict or for any other appropriate relief' (s 93(2)). Again there are no reported cases of such relief being sought, either by the Crown or by third parties.<sup>43</sup>

These formal undertakings and orders therefore are the most substantial evidence of intervention in the case of single-firm anti-competitive conduct in the UK, but there is limited evidence as to their impact once they are in place. The most substantial survey to date is that carried out in relation to the bus industry by National Economic Research Associates (1997). Because this deals in part with the subject matter of the inquiry examined in Chapter 5 this work is considered further in that Chapter.

<sup>43</sup> A lawyer interviewed for Chapter 8, below, was of the firm opinion that not enough was being done in relation to monitoring and enforcing undertakings and orders once they are in place.



In an attempt to expand the available evidence a survey of companies was carried out for the current study on the basis of the information published in the 'Register of Undertakings and Orders' (OFT, 1996c). All companies for which an address could be found were contacted and asked to comment on aspects of the orders or undertakings as applicable.<sup>44</sup> The response rate was very low, and it became clear that this was not an area of their activities that companies are prepared to discuss. Comments made by professional advisers, and reported in Chapter 8, suggest that there is a concern as to the efficacy of the process by which the implementation of undertakings is monitored and supervised. The application of the undertakings made following the inquiries examined in Chapters 6 and 7 are considered further in those chapters.

## CONCLUSION

Even this limited survey reveals two factors that raise questions about the extent to which full-scale intervention by the MMC and OFT produces a measurable result. Firstly it is clear that there are as many cases in which the company is found not to be acting against the public interest as there are cases in which conduct is condemned. In fact in this chapter the majority of reports considered led to the negative conclusion. Secondly there is a lack of consistency in arguments made by the authorities, and although this approach has been defended by the MMC<sup>45</sup> as being an essential ingredient of the investigative regime the lack of consistency probably reduces the general value of the report – nowhere is this more clearly seen than in the chain of cases dealing with predation in the bus industry. This conclusion is supported by evidence considered further in Chapter 8. The possibility that a lack of direct conduct modification required by specific reports might be balanced by a general response is therefore made to look less certain.

There are also clear tensions operating along various lines of fracture. Thus there have been disagreements between the OFT and the MMC (*photocopiers*); the MMC and eminent commentators (*ice creams*); and the MMC and the EC authorities (*TV guide information*). The fact that the UK system has required a dual agency approach, with an investigation switching horses midstream therefore appears to damage the apparent consistency of the operation of the regime, and may have further weakened the value of reports generally.

The fact that there are several instances of not only specific conduct, but also specific industries or firms being reinvestigated<sup>46</sup> suggests again that outcomes should be seen as being strictly limited not only to the specific case but also to a potentially narrow time period. The power to make general reports into market practices has been rarely used, and although the few reports that have been made have been cited since by the MMC they appear to be perceived as of being little value to those involved with the operation of the regime as advisors to companies. No respondent interviewed for Chapter 8 suggested that these operated as useful guides to present enforcement.

These criticisms notwithstanding it is clear that there have been cases in which there have been outcomes that are significant, both in the market in question and generally. These have benefitted both competing firms or prospective entrants, and consumers directly. Thus outcomes have ranged

44 This does not constitute the total listing. In some respects the information supplied in the Register is deficient: in particular companies may no longer exist in the form that they did when the order or undertaking was put in place.

45 See generally the evidence presented by the Chairman of the MMC to the House of Commons Select Committee (HC 249).

46 E.g., *photocopiers, petrol, tampons, condoms*.



from general changes to the law (*Ford*), to price controls (*matches and disposable lighters*), to the opening of access to essential facilities (*Southern Vectis Omnibus*). The impact of all of these requirements may have been considerable, although general responses to changes in the law or a clear statement of practice are difficult to measure as has already been discussed. As will be seen in Chapter 6 the impact of price restrictions even in a narrow industry may be significant justifying a number of investigations in which there is no obvious outcome. The range of options open to the MMC and OFT is in principle unlimited, although there are only a number that may be commercially acceptable or viable, particularly if the agency wishes to avoid a role as an ongoing regulator of the agency.

A question to be resolved, and something that is considered in particular in the following four chapters is the extent to which the procedures adopted by the MMC and OFT are the most appropriate by which the benefits identified as possibly arising in this chapter may be obtained, or whether similar, or better results, could be achieved by less costly and erratic means.



## Chapter five — *United Automobile Services*

### INTRODUCTION

In 1995 two reports into the operation of local bus services in the North East of England were published. The first of these, which forms the basis of this study, was an investigation under s 3 of the CA 1980 by the DGFT into the course of conduct pursued by United Automobile Services in response to the entry into the market of a smaller competitor, 'Your Bus'.<sup>1</sup> The second, which followed the Competition Act report, was a full public interest report under the terms of the Fair Trading Act, and covered a wider market than the former.<sup>2</sup> Some of the events surrounding the activities under investigation by the MMC attracted strong media interest,<sup>3</sup> although these events did not play a part in the conduct under examination by the DGFT in *United Automobile Services*.<sup>4</sup> This was the last report to be published by the DGFT under the Competition Act 1980,<sup>5</sup> and the first case study to be undertaken in relation to this research.

Three factors led to the selection of the report for this study. Firstly it was a matter that had been concluded by the time this research began, and was therefore already in the public domain. Secondly inquiries under the Competition Act are, as shown in the Annex, more highly focused than those under the Fair Trading Act and involve fewer parties. Given that this was to be the first report to be studied in some detail therefore it was felt that this limiting factor would make this an appropriate test study. Finally by selecting a Competition Act report it was possible to focus on the work of the OFT, which is involved also at the early stages of Fair Trading Act references.

---

1 *United Automobile Services Ltd: The operation of local bus services in Darlington* (OFT, 1995c).

2 *The supply of bus services in the North-East of England* (MMC, 1995b). The wider market covered by this report is set out in Appendix 4.1 of the report. The relative sizes of the completed reports gives an indication of the comparable scale of the two inquiries. The MMC report is 240 pages long, the report of the DGFT 51 pages.

3 See, e.g., Wolmar and Foster, 1994.

4 Although there was no formal legal link between the two inquiries the OFT withheld publication of the Competition Act report until the MMC had concluded its wider inquiry.

5 Section 12 of the Deregulation and Contracting Out Act 1994 made various amendments to the Competition Act. The combined effect of amendments to ss 3 and 5 was to enable the DGFT to make a reference to the MMC:

'(1) In any case where—

(a) there are reasonable grounds for believing that any person is pursuing, or has pursued a course of conduct which constitutes an anti-competitive practice'.

This eliminated the need for the DGFT to complete and publish his own report before proceeding to the reference, and although the power to do so is retained in s 3(1) the DGFT announced in the 1994 *Annual Report* that no further Competition Act reports would be produced (OFT, 1995a, 34). These provisions of the Competition Act 1980 will be repealed on the entry into force of the Competition Act 1998, s 15.



## THE INQUIRY

Following a complaint made by Your Bus Ltd into alleged predatory conduct carried out by United Automobile Services Ltd ('United') on various bus routes in Darlington the OFT launched an investigation under s 3 of the CA 1980<sup>6</sup> in May 1994. Specifically the allegation was that 'United put 13 additional buses into service on the routes in Darlington where it faced competition from the new entrant ... with a view to driving Your Bus from the market and therefore constituted predatory behaviour' (OFT, 1995c, para 9.1). On 25 May notice of the investigation was given to United,<sup>7</sup> and in June invitations to interested parties to submit evidence were published in appropriate newspapers and trade journals.<sup>8</sup> The completed report was published in March 1995.

Evidence was received from just 11 parties during the course of the investigation, only two of which had significant input: United, the subject of the investigation; and Your Bus, the complainant. Both agreed to be interviewed in relation to this research. The Office of Fair Trading also agreed to participate.

Because the purpose of this study was in part to develop the methodology that would be applied to the two later studies an attempt was made to contact as many of the remaining parties involved as possible. It became clear that parties on the periphery were hard to trace, and were unlikely to have had sufficient interest in the issue to be prepared to discuss matters further. In particular it appeared to be the case that third parties had often very limited involvement, and in the case of official bodies may have been responding to a request for information from the DGFT rather than having sufficient interest to make their own approach, and would have no record of their involvement. This was the case, for example, with the Traffic Commissioner for North East Area Traffic, who stated that no records were kept of their involvement in the report's compilation. A further problem arose in obtaining information about events that had happened some time prior to the publication of the report. In this case for example, a third bus company mentioned as having an involvement went out of existence prior to the research being commenced, and the relevant staff at North Yorkshire County Council had moved on. Members of the public who approached the OFT were hard to trace, but two of the four were contacted, and it is clear that they invested very little in the process, a result which appears to be a general one and is supported by further evidence presented in Chapter 6, below.

The primary purpose of the research was to ascertain as far as possible the costs to each of the parties of the investigation, and the benefits that may have flowed from the investigation and subsequent report, and to test the method of research to be applied to further studies. The extent to which such information would be available was not clear at the start of the study. It became

---

<sup>6</sup> The relevant law is set out in detail in the Annex.

<sup>7</sup> The text of that notice is as follows:

'It appears to the Director General of Fair Trading that United Automobile Services Limited ('the company') has been or is pursuing a course of conduct which may amount to an anti-competitive practice. Therefore he hereby gives notice that he proposes to carry out an investigation under section 3 of the Competition Act 1980 with a view to establishing whether the company has been or is pursuing a course of conduct which does amount to an anti competitive practice.

The matters to be investigated are:

- (1) the conduct of the company in respect of:
  - the registration and operation of local bus services in Darlington;
  - the method of operating those services;
  - the use of additional vehicles on those services in response to the entry of a new competitor, South Durham Bus Company Limited, trading as Your Bus;
- (2) whether that conduct, of itself or when taken together with a course of conduct pursued by persons associated with the company has, or is intended to have, or is likely to have, the effect of restricting, distorting or preventing competition in connection with the supply of bus services in Darlington.'

<sup>8</sup> See n 29, below, for the text of the notice.



clear early on that it would not be possible to obtain detailed cost-accounting information (e.g., time-sheets, salaries, expenses etc.) of the investigation for any of the parties: the OFT did not record time commitments of its staff in that way; for Your Bus, a small company, such records were never made; and the management of United were reluctant to discuss precise figures. The emphasis was therefore placed instead on the more general burdens that the procedure placed on the parties, the impact of the investigation on the market in question, and the views of the parties as to the efficacy of the procedures. All parties were able to give a clear explanation of the general commitment of resources to the investigation, and all had views as to the benefits, or lack of benefits, arising.<sup>9</sup>

## THE REPORT

Investigations into the operation of bus services have been a prominent part of the OFT's workload since bus deregulation.<sup>10</sup> Of the 36 reports published under the Act, 8 had as their focus practices, most commonly predation, in the bus industry.<sup>11</sup> While this repeated attention has raised questions as to the efficacy of the regime, it is not surprising that the bus sector should attract the interest of the OFT. The industry is highly dynamic: barriers to entry and sunk costs are low, and variable costs are the most significant operating factor.<sup>12</sup> Further:

'The characteristics of the bus industry also mean that it is relatively easy to take predatory action. It is easy to identify the key routes which form the sources of a competitor's revenues. Buses can be moved easily from area to another and put rapidly into service (as long as the operator has sufficient operating discs for the relevant traffic area). Any service can be run, as long as 42 days' notice of registration is given (and free services can be run without registration). Markets are generally very local. A predator may target a competitor in one area and finance itself from revenues from another area. In addition, brand loyalty is usually low.'<sup>13</sup>

The deregulation of the bus industry,<sup>14</sup> which saw the break-up and sale of the National Bus Company, was designed specifically to produce a large number of small 'independent' operators

<sup>9</sup> The approach to interviews is detailed in Chapter 2, above.

<sup>10</sup> See, e.g., *The Effectiveness of Undertakings in the Bus Industry* (National Economic Research Associates, 1997). Concerns extend also to the impact of restrictive agreements within this sector. See *The Restrictive Trade Practices Act and the Bus Industry* (OFT, nd).

<sup>11</sup> *The Southern Vectis Omnibus Company Ltd* (OFT, 1988b); *West Yorkshire Road Car Company Ltd* (OFT, 1989a); *Highland Scottish Omnibuses Ltd* (OFT, 1989b); *South Yorkshire Transport Ltd* (OFT, 1989c); *Kingston upon Hull City Transport Ltd* (OFT, 1990a); *Thamesway Ltd* (OFT, 1993c); *Fife Scottish Omnibuses Ltd* (OFT, 1994b); and *United Automobile Services Ltd* (OFT, 1995c). The approach of the OFT and MMC to allegations of predation is considered further in Chapter 4, above, which draws in particular upon the conclusions reached in these eight reports.

<sup>12</sup> For a discussion of the barriers to entry in the industry see *The supply of bus services in the north-east of England* (MMC, 1995b, paras 3.26–3.37). As the MMC noted: 'When deregulating the bus market, while the Government did not expect direct competition on all routes it took the view that, because barriers to entry in the bus market were low, all routes would be contestable. Operators would be forced to behave as if they faced direct competition because of the threat of competitive entry if they became inefficient or made excessive profits.' (at para 3.26). These conclusions have recently been challenged, and the argument made that 'contrary to the views of proponents of de-regulation, the evidence from our studies suggests to us that small scale entry will be successful only in exceptional circumstances, given the economic characteristics of the local bus industry' (National Economic Research Associates, 1997, para 4.3.2). NERA further conclude that '[e]ven in the absence of the type of entry barrier discussed in 4.3.2, it is clear from the case studies that the incumbent's reputation for aggressive response to entry, combined with an awareness of the increasing disparity in depth of pocket compared to the large operators, acts to discourage small scale entry in this industry' (ibid., para 4.3.3).

<sup>13</sup> *The supply of bus services in the north-east of England* (MMC, 1995b, para 3.35).

<sup>14</sup> See the White Paper on Buses (1984, Cmnd 9300) and the Transport Act 1985.



whose competition would benefit the consumer by offering more and cheaper services: 'the primary purposes of the changes were to promote competition and efficiency by removing legal barriers to entry and to limit the use of public moneys in the funding of bus operators'.<sup>15</sup>

It has often been suggested that the current competition law regime has no deterrent value, and that reports produced by the OFT or MMC produce no effects other than in the immediate situation to which they relate. In this study an attempt has been made to ascertain whether such reports are influential on third parties who are not themselves directly involved in the investigation. The results of a survey of bus companies are reproduced below.

From 1986 until 1993 the relevant market, local town bus services within Darlington (OFT, 1995c, paras 2.2–2.5), was effectively a duopoly, United taking about 45% of the market and Darlington Transport 55%. Your Bus entered the market in May 1993, operating primarily in direct competition with United, but overlapping only to a limited extent with Darlington Transport. United's response to the entry of Your Bus was 'vigorous' (OFT, 1995c, para 3.4) and the intense competition between the two companies hastened firstly the decision of Darlington Borough Council to sell Darlington Transport, its subsequent collapse, and the scramble to register services in Darlington. These matters fell within the ambit of the MMC investigation and were not considered by the OFT. However, the impact that the new competition had on the market, in particular the entry of Stagecoach via its subsidiary Busways, was a determining factor in the decision of the DGFT, based on the belief that the market had become highly competitive, not to seek remedies, in spite of finding that United had engaged in predation in breach of s 2(1) of the CA 1980.<sup>16</sup> Remedies were unnecessary, the DGFT concluded, 'because of the present competitive situation in Darlington, and the fact of [the] reference ... to the MMC on 25 November 1994' (OFT, 1995c, para 9.37). The bus market in Darlington was dramatically affected not by the entry of Your Bus, or the reaction of United, but by the collapse of Darlington Bus Company and the subsequent entry of Stagecoach, the most powerful of the bus operators. Neither was it felt necessary to make a specific reference to the MMC, the conduct of the parties already being included within the scope of the ongoing MMC inquiry.

### *The input and views of the primary parties*

#### **Your Bus**

Andrew Guest, the former Managing Director of Your Bus, was made redundant by United and then, together with a colleague in the same position, set up Your Bus to operate in competition with United on some routes in Darlington. From 27 May 1993 Your Bus had 12 buses operational each day from a fleet of 14, and wanted to develop new markets from the basis of a sound platform in Darlington. Within the first few days of Your Bus becoming an operating company a complaint alleging anti-competitive conduct by United was lodged with the OFT. Following a telephone call to the OFT on 10 May Your Bus was advised to put its complaint in writing: this took the form of a letter 'outlining the events, the methods by which United were counteracting [Your Bus's] position, their method of retaliation, their method of what they would say was

<sup>15</sup> *The supply of bus services in the north-east of England* (MMC, 1995b, para 3.4).

<sup>16</sup> The OFT defines predation as 'the acceptance of losses in a particular market which are deliberately incurred in order to eliminate a competitor, so that supra-normal profits can be earned in the future, either in the same market or in other markets. ... A predatory response may offer advantages to consumers in the short term, but is likely to reduce or eliminate competition in the longer term' (OFT, 1995c, para 9.3). See also Chapter 4, above, and Myers (1994).



defending their market'.<sup>17</sup> The OFT requested, and were sent on 9 August, preliminary statistical information. The information requested had to be specially prepared: 'it was information such as miles run per week, costs of operating, which wasn't very easy to produce because [Your Bus] hadn't been running very long. Together with revenue split up between routes.' All of that material was prepared in-house, by Mr Guest based in part upon accounts prepared by his partner's wife. With no other managerial staff<sup>18</sup> the work for the OFT tended to get pushed behind the necessities of day-to-day operational decisions and was done largely at home in the evenings. To prepare the initial information requested by the OFT, however, probably took no more than 10 hours. Further information was requested from Your Bus when the OFT formally began to investigate. Again this was slow in being delivered, but its collation did not impose a significant burden upon Your Bus. The only outside help sought at any stage was that of the local MP in an attempt to put pressure on the OFT to respond more quickly.

At the time the complaint was made to the OFT Mr Guest was not certain what impact the investigation would have upon United's conduct. In retrospect it would appear that there was no alteration in United's conduct following the notification to them that the OFT was involved. Suggestions that the complaint may have been made in order to disrupt United by forcing them to devote their resources to the investigation rather than to the marketplace were rejected by Mr Guest.<sup>19</sup> By the time the report, the conclusions of which Mr Guest feel to be 'fair enough' was published Your Bus had ceased operating, having sold their buses to West Midlands Travel, running their last services on 16 December 1994.

Mr Guest was asked to give his overall views of the efficacy of the process:

'I wouldn't want this to be portrayed as a view of United, or necessarily of any of the bigger companies, but certainly if I was working for one of the bigger companies now and this scenario came up again I would take the view that trying to eliminate competition because of the length of time it would take for the implementation of competition law to be effective the result may well have come about by then. If it hasn't you have your knuckles rapped and that's that. From the point of view of the smaller person who was making the complaint I found it very frustrating that it took so long for the wheels to come into motion. ... But given that it took from May and a lot of badgering through to the following May in 1994 before anything became of our complaint I think that is an unreasonably long time in business. Approximately September 1993 we were being told there will be a decision on it within a week or so. And oddly enough I was actually asked at one stage how much longer did we think we could survive. And I am always curious as to whether the question, which seemed to be a standard question, was asked of me because nature might take its course without the OFT having to act, or whether it was a question asked out of any sympathy. If it was asked out of any sort of sympathy then it wasn't followed up with any great haste. It was very sad that at the end of the day the decision was made when it was utterly irrelevant because all had settled down and just exploded off the scene and Darlington was a completely different place for bus operation by the time March 1995 came along. But the frustration certainly from our point of view was the constant badgering to try and get some progress and this maybe unfair of me to say this, I think there was a certain disparity in the outlook of people who are civil servants to those who are in business. There is a need for decisions to be made very much more quickly if competition law is to have any effectiveness at all.'

While he would not rule out an approach to the OFT if he were to be involved in a similar situation in the future Mr Guest is clear that for such an approach to be beneficial the OFT would need to act more quickly than it did in this case.

---

<sup>17</sup> All unattributed quotes in this section are taken from an interview held with Mr Guest.

<sup>18</sup> The company employed in total 2 co-directors, 14 drivers and 2 maintenance men.

<sup>19</sup> The OFT raised this general possibility, see below.



## The OFT

Within the OFT the Darlington investigation was dealt with by Mr Gover James, who is responsible for public transport and the travel industry. Given the specialisation staff are able to monitor the industry fairly closely 'we pick up all sorts of rumours from different people, or reading the trade press'<sup>20</sup> and it is often possible to tell fairly quickly whether any individual complaint is likely to merit careful investigation. The OFT 'recognise that some complaints are made maliciously in the hope that [they] are going to take it up and tie up the other company's management and time' and are careful to weed out as many of these as possible, while knowing at the same time that some may get through 'because they are cleverly done'. Your Bus's appeared to be a genuine one, 'accepting at face value the truth of what was said', and further information was requested from Your Bus. Delays in the provision of this information meant that detailed information was not requested from United until 6 June 1994, over a year after the original complaint was submitted,<sup>21</sup> the formal investigation not being launched until May 1994. The formal OFT file was opened in October 1993, some five months after the complaint. It is the OFT's view that the burden on the industry of supplying the information requested is not excessive, and the OFT attempts to request information in a format that is readily available:

'The cost and revenue information we accept in the four week periods, the bus industry historically works in four week periods. ... We are happy to take it in that form. They have got the management accounts already there and that's the way we'll take it. So it ought not to be a problem and we don't ask for information that they don't have readily available.'

By virtue of s 3(7) of the CA 1980 the DGFT can compel those to whom requests for information are addressed to provide the information or answers requested.<sup>22</sup> While the experience of the OFT suggests that companies do not usually submit more evidence than is requested of them they may go to some length to justify their actions, particularly where this might avoid a full MMC reference. The OFT received no evidence from Darlington Bus Company, the second biggest operator in the town, or from its owner, Darlington Council. Only limited evidence came from the Traffic Commissioners and from North Yorkshire and Durham County Councils.<sup>23</sup> The four submissions from the public took the form of single letters and were not related to the issue of competition *per se*, but to concerns relating to congestion and environmental matters.

Within the OFT as many as 12 staff might have been involved in the investigation, with six being directly involved in the investigation and in preparing the report. Two staff assist Mr James on buses; at least one internal lawyer, accountant and economist would also have been

---

20 All unattributed quotes in this section are taken from an interview held with Mr James.

21 The Notice made under s 3(7) of the Competition Act 1980 sent to United reproduced above at note 7.

22 Section 3(7) is in the following terms:

'(7) for the purposes of an investigation under this section the Director may, by notice in writing signed by him—

(a) require any person to produce, at a time and place specified in the notice, to the Director or to any person appointed by him for the purpose, any documents which are specified or described in the notice and which are documents in his custody or under his control and relating to any matter relevant to the investigation; or

(b) require any person carrying on business to furnish to the Director such estimates, returns or other information as may be specified or described in the notice, and specify the time, the manner and the form in which any such estimates, returns or information are to be furnished;

but no persons shall be compelled for the purpose of any such investigation to produce any document which he could not be compelled to produce in civil proceedings before the High Court or, in Scotland, the Court of Session or, in complying with any requirement for the furnishing of information, to give any information which he could not be compelled to give in evidence in such proceedings.'

23 The OFT confirmed the view suggested above that the input required by these bodies would have been minimal, and that the approach was made by the OFT.



involved. Then the report would move through the hierarchy of the OFT up to the DGFT. The commitment made by each staff-member involved would over the course of the investigation. Mr James' staff 'might have spent at times 100% of their time on it. [Mr James] would have been spending I suppose 25% of my time at peak level ... then it ... tapers off'. Asked expressly about the level of resources involved Mr James replied:

'it sort of builds up the time spent on it in terms of percentage of ones time. Over the early stages its doing something, firing off a letter to somebody, then sitting back and doing other things while you are waiting for a reply to come back but once you get to the formal stage it is much greater. If you are going to say how many man hours does it take ... I haven't got the foggiest idea'.

At the time, although some changes have since been made, the OFT did not record staff involvement in such a way that the question could be answered. The investigation was 'on the small side certainly ... going on in one town with only three bus operators there.' Asked whether the defining characteristic of an OFT investigation would be that 'the investigation is undertaken because the officer handling the case, or the DGFT [through him] is satisfied that there is a sufficient threat to competition to merit investigation', Mr James replied: 'Yes it is'. No formal, or even semi-formal, cost-benefit analysis is conducted internally before launching an investigation, although as the aborted attempt to investigate bus services on the Isle of Arran showed the OFT may be required to persuade the Minister that an investigation is justified.

Mr James does not think that the launching of the investigation, or the publication of the report, affected the conduct of the parties, although 'you don't know what they might have done if we hadn't been involved'. In fact, although United stand condemned in the report the OFT Mr James considers that they 'acted sort of honourably ... if only every bus operator did that.' However, because United did have options that would not have involved increasing service frequency without a corresponding increase in revenue, the OFT felt obliged to find against them.

#### United Automobile Services ('United')

At the time of the inquiry United was one of three operating companies owned by North East Bus Ltd. The Group Managing Director, M S Widmer, was the first person to be interviewed in connection with this research project. When Your Bus entered the market United had about 40–50% of the Darlington market, occupying second place next to Darlington Borough Council (DBC). Mr Widmer characterised the competition from Your Bus as 'heavy',<sup>24</sup> and the company had to decide between making no response at all, withdrawing from those routes, or competing with Your Bus. In taking the third option United knew from the outset that the OFT might become involved: 'we knew that the OFT would be interested if we made any response at all so the OFT's involvement was anticipated and expected rather than a surprise.' It was thus the case that the fact that the OFT would likely become involved did not operate as a deterrent on United's conduct. Nevertheless the involvement was not welcome, the company being concerned about 'the management time that was going into it, the cost it would take and the extent to which it would take our eye off the rest of the business'.

The company was asked for initial information following Your Bus's complaint, and then sent a detailed questionnaire on 6 June 1994 when the investigation entered its formal stage. United does not accept, as the OFT suggested, that this information is 'information that they have readily available'. In all three of the case studies companies have criticised the extent to which

---

24 All unattributed quotes in this section are taken from an interview held with Mr Widmer.



they are obliged to provide information in a format to suit the regulator, that may bear little relationship to the way in which such matters are dealt with inside the company. United were required to produce:

‘Specific accounting period information, route information, mileages, total market share, market shares of competitors, a whole host of, service changes as a result, the position of the market before the behaviour, or before the competition, during the competition, after the competition, a tremendous amount of information required. ... Some of it is very simple. Maybe 15%. Some of it is already available and needs to be repackaged. Maybe 55%. But the repackaging is a tiresome and cumbersome task. And above that basically has got to be derived from other sources. We’ve got to go back and reconstruct things that we wouldn’t do in the normal course of running a business.’

The Darlington investigation was seen as a small-scale matter within the company that involved only a small part of the company’s operations. Only four or five people inside the company were involved in preparing the material for the OFT, the district manager on the road, one, or possibly two, staff in the company’s traffic support unit, a member of the financial team, and Mr Widmer himself who was ‘very heavily involved at the front end’. Although it was a concern that an investigation into what was essentially one small part of the business (13 buses out of a fleet of 500) would take the management’s eye off the company’s wider business the company’s view is that its commercial operations did not suffer as a result of the investigation. The company estimates that as many as 300 to 400 hours total work was involved, some way from the 10 or so put in by Your Bus, yet the OFT agreed that it did not receive more information than it asked for. Some of the questions asked by the OFT involved considerable work to reply to. Question 5, for example, is in the following terms:

‘Please provide monthly cost and revenue data for the relevant routes for the period January 1993 to the present. You should specify each of the costs below and detail the basis on which such costs were arrived at for each individual route:

- total revenue from fares
- total revenue from other on-bus income (specify)
- off-bus income (specify)
- drivers, wages per hour (including national insurance contributions and superannuation)
- bus operating costs such as maintenance and cleaning
- depreciation
- depot costs
- other fixed overheads’

Few outside resources were called upon and lawyers, to whom companies will usually turn in such cases, were not involved in the process. The company’s view in this respect was that:

‘there was little that the lawyers could do that we couldn’t do ourselves. First time around you want a lawyer to be involved in it. Second time around you think well we can do that ourselves, providing there’s not a point of law.’

A consultancy firm, Advocacy, was used to ‘translate [the] facts and figures into a language that was more readily understood by the OFT’ and various MPs, both those who were local and those who were perceived as having an interest in the subject, were approached. United have continued to lobby for changes to the competition procedures. In its own cost-benefit-analysis report the OFT expresses its concern about rent-seeking activity,<sup>25</sup> and expenses incurred by

<sup>25</sup> This report, commissioned as part of the OFT’s Research Paper series, remains unpublished, and is referred to here in only general terms.



ongoing lobbying following the report's publication cannot be reasonably attributed to the investigation. However, if lobbying during the process of investigation were a common feature it would suggest perhaps that the system is vulnerable to the exercise of political pressure. Evidence collected in Chapter 8, however, suggests that this is not a common feature, and that professional advisers will counsel against the use of lobbyists.

United did not alter its conduct in response to the OFT involvement.<sup>26</sup> The company's parent, North East Bus, was already subject to undertakings following a merger in nearby Trimdon, and therefore expected its conduct to be subject to increased scrutiny.<sup>27</sup> Expecting that Your Bus would complain to the OFT the company had attempted to shape a competitive response that would be accepted as legitimate. However, it is clear from other sources that there was a serious battle underway. At a public meeting attended by managers of the three affected companies Mr Widmer is quoted as telling local residents: 'We have £750,000 to throw at this and we will do it if that is what it takes to see Your Bus disappear' (Burton, 1994).<sup>28</sup> The company is of the view that the investigation had no impact on any aspect of the relevant market.

United remain dissatisfied with the conclusion reached by the OFT. The only possible justification, they argue, is that the OFT was concerned to 'send out a signal to other operators that behaviour such as we employed was anti-competitive' and that 'they were comfortable in doing that because although they found us guilty they had a very good excuse, or reason for not putting any penalties on us.' However, United do not believe that, even on that level, the report will have any impact given that in reaching its conclusions 'no cognisance is taken of realities' by the OFT. There would appear to be substance to United's claim that, had they been determined to do so, they 'could have put Your Bus out of the market in two months' and that they did not do so out of a general desire to comply with fair commercial practice.

#### The private parties

Two of those who contacted the OFT responded to a questionnaire. Councillor Peter Jones was the Conservative transport spokesman on Darlington Council; Ms Bethany Megan-Robinson a concerned individual. Both of these parties responded to a notice placed in the Northern Echo by the OFT in July 1994.<sup>29</sup>

<sup>26</sup> It should be noted that under both the Competition Act 1980 and the Fair Trading Act 1973 the DGFT had no power to impose interim measures. This position will be changed under the reforms instituted by the Competition Act 1998.

<sup>27</sup> For further mention of the effect of these undertakings see below.

<sup>28</sup> It should be noted that it has been suggested (Myers, 1994, para 3.34) that:

'Private statements ... that a firm wishes to eliminate competitors would not usually be regarded as evidence of intent [of predatory conduct]. Public statements to this effect could be seen as weak evidence of intent since they may convey the message to the entrant that it should exit the market before it is forced out. Equally they may be seen as bolstering the morale of staff involved in a competitive battle. Therefore, given the difficulties of interpretation, more weight is attached to the actions that the alleged predator takes than the statements that it makes, when making the assessment of intent.'

<sup>29</sup> The notice was in the following terms:

'Competition Act 1980

Notice Under Section 3(2)(b)

United Automobile Services Ltd

Under section 3 of the Competition Act 1980, the Director General of Fair Trading is to investigate whether United Automobile Services Ltd ("the company") has been or is pursuing a course of conduct which amounts to an anti-competitive practice.

The matters to be investigated are:-

(1) the conduct of the company in respect of:

the registration and operation of local bus services in Darlington;

the method of operating those services;

the introduction of extra vehicles on to those services in response to the entry of a new competitor;



Even before that date Cllr Jones had contacted the OFT in November of 1993 following complaints from ward constituents. Both parties had contacted other official bodies – the police, who had become involved following incidents between rival drivers, traffic commissioners and the local MP. Ms Robinson had written to the Prime Minister. Both parties went to some effort to present their case to the OFT. Cllr Jones, who already knew something of the role of the OFT from his Council and private business experience, estimates that gathering and processing information will have taken him up to 4 days and that he would have incurred some expenses, although he was unable to detail these. Ms Robinson wrote two letters which ‘consisted of quite lengthy details’, and incurred only minimal expenses on photocopying. Both parties received standard acknowledgements to their letters, and were sent a copy of the report when it was finally published in March 1995. Both agreed with the conclusions that the OFT reached, but felt that the process took far too long. It would appear from their responses that both Cllr Jones and Ms Robinson were motivated by concerns going beyond the remit of the Competition Act, in particular regarding pollution, congestion and the possible hazard posed by the extra traffic.

*Precedent value (the ‘reach-across’ effect)*

Mr Widmer suggested that the OFT might have reached the conclusion that United had been engaging in predatory conduct ‘to send out a signal to other operators that behaviour such as we employed was anti-competitive in their eyes’. Within the OFT there is strong feeling that, in spite of the absence of a *per se* prohibition, past findings of predation or anti-competitive conduct may act as a deterrent to other companies considering similar activity. In particular the report into the refusal by the Southern Vectis Omnibus Company to allow competitors access to Newport Bus Station, on the Isle of Wight (OFT, 1988b) is considered to have pre-empted many other such actions, the report being one of the most requested from the OFT. Mr Gover James argues, for instance, that had the DGFT’s recommendation for a formal reference in relation to bus services on the Isle of Arran been followed by the Secretary of State,<sup>30</sup> that ‘bus operators at the other end of the country’ might have had their behaviour affected by that investigation. Nevertheless there are difficulties in establishing the deterrent effect of past rulings, and the very fact that the OFT has been called upon to examine the bus industry so often might suggest that such effects are not significant. A research paper prepared for the OFT, *The Effectiveness of Undertakings in the Bus Industry* (National Economic Research Associates, 1997) specifically considered this issue, on the basis that ‘the existence of undertakings could have affected conduct more generally by establishing a set of “conduct rules”’ (para 4.2.6). Evidence drawn from the Darlington events lead the authors to conclude that this is not a significant factor:

‘First, and most striking, is the evidence from the Trimdon case, and the subsequent events in Darlington, of a distinct absence of any carry-over between local areas in companies subject to undertakings. In the case of North-East Buses, the absence of

---

*Contd*

- (2) whether that conduct, of itself or when taken together with a course of conduct pursued by persons associated with the company has, or is intended to have, or is likely to have, the effect of restricting, distorting or preventing competition in connection with the supply of bus services in Darlington.

If you have any information which you consider would help the Director General please write to:

...  
Your letter should arrive as soon as possible if it is to be taken into account in the investigation.’

<sup>30</sup> This point is considered in the Annex, below.



effect is especially striking because of Darlington's closeness to the Trimdon areas' (para 4.2.6).<sup>31</sup>

In an effort to determine whether such reach across effects do exist a questionnaire was sent to 125 bus operators in the UK. Names and addresses were drawn from *The Little Red Book 1995/96*, 'the leading directory for the bus and coach industry'. Four selection criteria were used to identify firms: (1) that they responded to the most recent entry form for the directory;<sup>32</sup> (2) that address information was complete and included a post-code; (3) that the firms operated local bus services;<sup>33</sup> and that the firms were not owned by one of the 'major groups' as at the time of the directory's publication. 13.1% of the 949 firms listed as operating local bus services were surveyed. Some 53 firms responded, a rate of 42.4%.<sup>34</sup>

Although this survey is not intended to provide sufficient data for an exhaustive inquiry into the attitudes and responses of the bus industry to competition law some conclusions may be drawn. Firstly it is clear that the majority of respondents feel that their conduct may fall to be regulated

31 At para 4.2.4 the paper's authors, in analysing entry following the putting into place of undertakings note that: 'No new entry has occurred in Trimdon; when entry occurred in nearby Darlington, the existence of undertakings in Trimdon did not prevent North East Buses from predating on the entrant, who eventually sold out to North-East's parent company'.

32 Such firms are denoted in the directory. Many firms are listed that did not respond. Given the high state of flux in the industry it was considered that those firms that had responded were more likely to be currently operating.

33 Firms may operate various services ranging from private hire to continental excursion. Public services must be licensed by the Area Traffic Commissioners and routes and timetables must be registered. Such 'bus services' are defined in s 159(1) of the Transport Act 1968, as amended by Sch 1, para 1 Transport Act 1985. As the actions under scrutiny in Darlington concerned such services it was felt appropriate to limit the enquiry to providers of these services.

34 The questions and responses are as follows:

[1] Is your company subject to the rules of the Competition Act 1980? Yes 31 (58%) No 5 (9.4%) Don't know 17 (32%)

[2] How would you characterise your knowledge of the Act?

I have a good knowledge of the relevant provisions 3 (5.6%)

I have a broad understanding of the Act's requirements 19 (35.8%)

I have a vague understanding of the Act's requirements 17 (32%)

I do not know what the requirements of the Act are 14 (26.4%)

[3] Have you read any OFT reports into conduct in the bus industry?

Yes 29 (54.7%) No 24 (45.2%)

[3a] The number of readers of each report:

Southern Vectis Omnibus Co Ltd 11 (20.7%)

West Yorkshire Road Car Co 2 (3.7%)

Highland Scottish Omnibuses 8 (15%)

South Yorkshire Transport 11 (20.7%)

Kingston upon Hull City Transport 4 (7.5%)

Thamesway Ltd (Southend on Sea) 4 (7.5%)

Fife Scottish Omnibuses 8 (15%)

United Automobile Services Ltd (Darlington) 16 (30%)

[4] Have you ever attended a seminar or conference on the application of competition law, or where the application of competition law was discussed in any detail? Yes 14 (26.4%) No 39 (73.5%)

[5] When competing would you feel obliged to comply with the terms of the Competition Act? Yes 36 (67.9%) No 8 (15%) (2 respondents inserted 'Don't know'; 1 replied 'probably')

[6] Which of these statements are true/false

It would be a breach of the Act to run more buses in response to a new competitor: True 5 (9.4%) False 40 (75.4%)

It would be a breach of the Act to reduce fares in response to a new competitor: True 8 (15%) False 36 (67.9%)

The fines levied on those who breach the Act are significant: True 20 (37.7%) False 26 (49%)

It would be a breach of the Act to operate at a loss: True 17 (32%) False 23 (43.3%)

It would be a breach of the Act to make an incremental loss on a particular route: True 24 (45.2%) False 20 (37.7%)

It would be a breach of the Act to operate with the intention of minimising a competitor's revenue: True 16 (30.1%) False 27 (50.9%)

The figures here are, first, the absolute number of responses and in brackets the percentage response from the sample as a whole. Thus nil returns to specific questions are not registered, but are not discounted from the percentage calculation.



by the Competition Act. While the fact that nearly a third (32%) of respondents did not know if the Act applies to them suggests a significant degree of uncertainty it is quite possible that in some cases there would be genuine doubt as to whether market shares and turnover were within the relevant thresholds. Most respondents demonstrated a willingness to respect the terms of the Competition Act. It is however interesting that 2 of the 3 who defined their knowledge of the Act as good replied that they did not feel obliged to comply with it, and it is probably significant that 37.7% of respondents, erroneously, agreed that 'fines levied on those who breach the Act are significant'. Over half (54.7%) had read at least one Competition Act report, and the Darlington Report was the most read of those listed, with 55% of those who had read any reports reading it. At the same time there remains confusion as to the proscriptions of the Act. Whilst only two of the true/false choices facing respondents can be answered correctly without further qualification one of these ('it would be a breach of the Act to operate with the intention of minimising a competitor's revenue') is a conclusion drawn directly from the Darlington report. Of the 16 respondents who had read the Darlington report 3 chose not to answer any of the true/false questions, 11 thought that the statement was false, and only 2 (12.5% of those who had read the report) thought that this was true. It would appear that even where managers are willing to comply with the law, and have taken the effort to read individual reports the extent to which those reports will accurately determine future conduct is, on the evidence of this small sample, not significant.

## CONCLUSION

As has been noted already the Competition Act 1998 is, in relation to the parts discussed here, to be repealed following the entry into force of s 17 of the Competition Act 1998 on 1 March 2000. This study is therefore of limited value in relation to the investigations that will continue under the 'new' regime. In fact it is in part because of cases such as this one that the regime is being reformed. The Darlington example may have been in the mind of Lord Borrie in the debate in the Lords on the passage of the 1998 Competition Act:

'... there have been extremely serious cases in the past when it has not been found possible to complete an investigation. I use as an example the predatory pricing on the part of one bus company against another. By the time the investigation had been completed and any final measures were available to the authorities, the bus company complainant had gone into liquidation and been wiped out by the anti-competitive practice being engaged in.'<sup>35</sup>

None of the parties involved in this investigation believes that any benefits flowed directly from the involvement of the competition authorities, and given that the market had radically altered between the time the complaint was made and the publication of the report there has been no justification in attempting to assess whether direct benefits did follow the investigation.<sup>36</sup> For Your Bus, and the complaining public, the process was too slow to have any effect; United did not amend their behaviour, believing that they would be exonerated at the inquiry's end; and the OFT realised that the position had changed in the market place to the extent that the Report had no role to play when it was published. While the OFT argue that, had the position not had

<sup>35</sup> Lord Borrie, (1997) Hansard (HL) 17 November, col 421.

<sup>36</sup> The authors of the NERA research paper suggest that 'given the relatively small size, in terms of turnover, of the markets concerned, it seems possible that initial and continuing costs ... could easily outweigh any potential benefits in terms of increased consumer surplus' (National Economic Research Associates, 1997, para 4.2.3). While such a calculation has not been made here, in view of the peculiar facts of this case, there is no reason to doubt that a similar conclusion would apply.



changed as radically as it did, they could have referred the matter to the MMC which was the outcome most feared by United, United remain convinced that had the OFT been faced with such a stark choice United's conduct would not have been condemned. If any benefit is to be found it is in the report's 'reach-across' effects. Although the results of the survey outlined above suggest that nearly a third of those responsible for the operation of bus services may have read, or be familiar with the report, it is also shown that its conclusions have not been well recognised.

While the report was limited only to one party's conduct, and its effect on only one competitor across a narrowly defined and geographically constrained market, it cost the OFT the time of up to 12 staff, with the case officer devoting several days' work to the investigation and writing of the report. Mr Widmer estimates that United staff, some of them senior, spent as much as 400 hours on preparing material for the OFT, although it may have been in United's interest to exaggerate that figure given that the company was at the time of its participation in this research continuing to lobby for a change in the law. For Your Bus the direct cost was approximately 10 hours of a hard-pressed managing director's time. In the absence of their direct response it is not possible to be certain as to the resources that would have been committed by Durham and North Yorkshire County Councils, and the NE Area Traffic Commissioner, but based on the OFT's estimate it would seem to be small.

In this case it is clear that the costs of the process greatly outweighed the *direct* benefits of the application of the law. It is more difficult to determine whether indirect benefits arising out of any precedential value of the report, although the arguments set out in Chapter 4, and evidence presented in Chapter 8 suggests that any such value may be a low one. The study showed that it would probably be impossible to derive precise cost figures, a conclusion later confirmed, and the impact on the methodology was to move the emphasis away from a quantitative accounting approach to a qualitative analysis. In the next two chapters further evidence is produced to support points made here. Several factors emerge as being standard across all three cases, even allowing for the involvement of different institutions. Third parties are reasonably able to make their views heard, although such views may be discounted as falling outside the 'competition' remit of the investigators; significant inputs are required only by the main parties to the investigation; companies manage this process very tightly; and all are concerned about the burdens imposed upon them by the ways in which information is required to be supplied.

Other factors are unique to this case. The MMC, for example, is under far greater time constraints than the OFT, and must report within set periods once a reference is made.<sup>37</sup> Few markets undergo as much change as was the case here, and it is rare for a complainant to go out of business during the course of an inquiry.

---

<sup>37</sup> The question whether these restraints impose arbitrary and inefficient cut-offs in the process is considered in Chapters 6, 7 and 8.



# Chapter six — *Classified Directory Advertising Services*

## INTRODUCTION

A scale monopoly reference to the MMC relating to classified directory advertising services was made by Bryan Carsberg, then DGFT, on 1 March 1995.<sup>1</sup> In making the reference the OFT was reacting to concerns that the 85% market share enjoyed by British Telecommunication's subsidiary Yellow Pages gave the latter the power to act anti-competitively, and to suggestions that 'Yellow Pages is trying to wipe out smaller rivals by launching its own local directories' (Atkinson, 1995).<sup>2</sup> The DGFT remarked that 'complaints to my office that the company has now introduced new and more localised directories, in which advertising rates are linked to favourable discounts on advertising in existing Yellow Pages directories, can be considered by the MMC' (Eadie, 1995). Further concerns related to the copyright over the yellow pages name, the phrase being used generically in America to refer to any classified telephone directory, but serving in the UK

---

<sup>1</sup> The full text of the reference is as follows:

'The Director General of Fair Trading, in exercise of his powers under sections 47(1), 49(1) and 50(1) of the Fair Trading Act 1973 ('the Act'), hereby refers to the Monopolies and Mergers Commission the matter of the existence or possible existence of a monopoly situation in relation to the supply in the United Kingdom of classified directory advertising services.

The Commission shall investigate and report on the questions whether a monopoly position exists in relation to such supply and, if so:

- by virtue of which provisions of sections 6 to 8 of the Act that monopoly situation is to be taken to exist;
- in favour of what person or persons that monopoly situation exists;
- whether any steps (by way of uncompetitive practices or otherwise) are being taken by that person or those persons for the purpose of exploiting or maintaining the monopoly situation and, if so, by what uncompetitive practices or in what other way;
- whether any action or omission on the part of that person or those persons is attributable to the existence of the monopoly situation and, if so, what action or omission and in what way is so attributable;
- whether any facts found by the Commission operate, or may be expected to operate, against the public interest.

In this reference 'classified directory advertising services' means the undertaking and performance of engagements to publish advertisements in directories which:

- show suppliers of goods and services, classified by reference to the goods or services supplied; and
- are distributed wholly or mainly to consumers (within the meaning of section 137(2) of the Act).

The Commission shall report on this reference within a period of nine months from the date hereof. 1 March 1995.'

Section 137(2) of the Act defines consumer thus:

'"Consumer" ... means any person who is either—

a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them, or  
a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them,  
and who does not receive or seek to receive the goods or services in the course of a business carried on by him.'

<sup>2</sup> Thus, for instance, Yellow Pages introduced five local directories in London boroughs all covered by existing London area Yellow Pages directories.



as both a potent marketing tool and a potential barrier to entry. BT's major rival, The Thomson Organisation, owned at the time of the inquiry by US West, with approximately 13% of the market, and much smaller competitors such as Telepages were reported to be delighted at the prospect of the inquiry. BT, however, expressed publicly its confidence that it had acted properly,<sup>3</sup> and, it was believed, would contest the market definition arguing that the relevant market was that for all classified advertising including newspapers and freesheets. If this wider market were to be taken into account Yellow Pages' market share would be well below the threshold 25%.

## THE MMC REPORT

The MMC's report was published in March 1996 (MMC, 1996c), and is among a minority of reports in leading to undertakings being made in relation to the activity under consideration, although not all of the MMC recommendations were accepted by the Secretary of State. The inquiry completed its work within the reference period, the cost to the MMC being 'just under £0.5 million'.<sup>4</sup> The MMC's conclusions relating to the public interest are as follows (MMC, 1996c, para 2.100):

'(a) The charging by [Yellow Pages] of prices higher than would be the case if competition were effective is a step being taken by BT for the purpose of exploiting the monopoly situation, and an action attributable to the existence of the monopoly situation, and operates, and may be expected to operate, against the public interest, with the particular adverse effect of higher prices being paid by advertisers than would otherwise be the case. ...

[Yellow Pages]' publication of local directories is a step being taken by BT for the purpose of maintaining the monopoly situation and an action attributable to the existence of the monopoly situation, which may be expected to operate against the public interest, with the particular adverse effects of reducing the effectiveness of competition to [Yellow Pages] and thereby reducing choice and increasing prices of the reference services in the longer term.'

In reaching these conclusions the MMC determined, *inter alia*, that the relevant market was that set out in the reference and not the wider market for classified advertising services as was argued by BT. In particular, a market survey commissioned by the MMC established that 'a much greater proportion of advertisers would be impervious to quite substantial relative price increase than say they would change their advertising policy in such circumstances' (MMC, 1996c, para 2.34).<sup>5</sup> On this market definition Yellow Pages held a market share of 84%, and Thomson 14% with smaller firms accounting for a further 2%, and the MMC was convinced of Yellow Pages' 'position of considerable strength and dominance' (MMC, 1996c, para 2.45). The four recommendations made by the MMC relating solely to the conduct of BTYP's exclusive scale monopoly, are as follows:

3 John Condron, managing director of Yellow Pages, was reported as saying: 'We believe we operate fairly and competitively across the entire range of Yellow Pages directory products and are confident we can lay to rest any concerns about our position and practices' (Eadie, 1995).

4 Geoffrey Williams, Finance and Information Systems Manager, MMC, in letter to the author, 4 December 1996.

5 The MMC was further able to point to Yellow Pages own promotional literature, in which the company pointed to the differences between advertising in the Yellow Pages and in other media: 'Yellow Pages is the one your audiences will turn to when they're ready to buy. Yellow Pages is the point of sale medium ... it effectively completes your campaign' (MMC, 1996c, para 2.29).



- (a) BT should be required to establish [Yellow Pages] as a separate subsidiary of BT, and that the subsidiary should be subject to the reporting and other requirements specified in Appendix 2.1
- (b) BT should undertake that all arrangements between itself and [Yellow Pages] for the use by [Yellow Pages] of BT's facilities or services should be on an arm's length basis, and (where appropriate) in the public domain and accessible to other suppliers on the same terms...
- (c) As regards directories to be published in September 1996 or later, [Yellow Pages] should be prohibited from making any charge to an advertiser higher than is arrived at by applying a formula based on changes in the RPI, less two percentage points (an RPI – 2 formula)...
- (d) [Yellow Pages] should be prohibited from publishing or distributing more than one consumer classified directory covering or including all or part of any particular area.' (MMC, 1996c, para 2.116)

The recommendation that Yellow Pages advertising costs be set at a maximum of RPI – 2<sup>6</sup> was criticised by Thomson's as likely to reduce competition rather than opening up the market, and did not appear to be of undue concern to Yellow Pages' Managing Director who said that it would not lead to a decline in operating profits (Reguly, 1996). However, in recommending this action the MMC was swayed by what it felt to be the unlikely prospect of 'a serious challenge being mounted to [Yellow Pages] dominant market position over the next few years' (MMC, 1996c, para 2.117). A note of dissent was struck by one of the panel, Catherine Blight, who

---

<sup>6</sup> The full terms of the recommendation are as follows:

**'Application of the RPI-2 formula'**

- 1 The purpose of the price control is to ensure that, on the basis of a like-for-like comparison, real prices paid by advertisers in BTYP's directories decline, relative to the RPI, by at least 2 per cent annually.
- 2 BTYP should continue to specify all its prices for advertisements in a comprehensive published rate card, and should make no charge higher than specified in the rate card from time to time current.
- 3 Once rates have been specified in a rate card for a particular month of publication they should not be increased for that month of publication in a subsequent rate card.
- 4 Any new rate card should, subject to paragraph 10, use the same criteria, for example as to size of advertisements.
- 5 BTYP should replace its current rate card, dated July 1995, with a new rate card (the revised card) as soon as practicable after publication of this report.
- 6 No price in the revised rate card relating to any directory to be published in September 1996 or later should be higher than the lesser of:  
the price for the directory and size of the advertisement shown in the July 1995 rate card for the respective month of publication; and  
the price arrived at by applying to the previous year'
- 7 The adjustment referred to in paragraph 6(b) is to multiply the previous year's price by the fraction—

$$\frac{\Delta RPI - 2}{100}$$

— where  $\Delta RPI$  is the RPI number for the latest month for which statistics are available prior to publication of the revised rate card, expressed as a percentage of the RPI number for the same month in the preceding year.

- 8 Prices in BTYP's rate cards published subsequent to the revised rate card should be subject to the same limitations as set out in paragraphs 6 and 7, *mutatis mutandis*, BTYP should not publish rate cards subsequent to the revised rate card at less than yearly intervals without first satisfying the OFT that more frequent publication is justified.
- 9 Prices arrived at by application of the formula may be rounded to the nearest whole pound.
- 10 If BTYP wishes to make any significant change to its present business practice, for example by modifying the available range of advertisement sizes, or the sizes themselves, or the ordering of entries, it should first demonstrate to the satisfaction of the OFT that advertisers will not be adversely affected, having regard to the purpose expressed in paragraph 1.
- 11 It is recognised that BTYP may wish to continue its present practice of occasional rescoping of directory areas to reflect changing market circumstances. Maximum price rates for rescoped directories should be determined by reference to GMC, as follows. No price rate for a newly rescoped directory should exceed the average of the latest published respective rates for the five directories with immediately larger GMCs and the five directories with immediately smaller GMCs.
- 12 The DGFT should so draft the undertakings that no action calculated to frustrate the purpose expressed in paragraph 1 can be carried out.' (Appendix 2.2).



argued that ‘the adverse affects we have found should properly be addressed by remedies directed at enhancing competition and encouraging new entry, rather than by resorting to price control which would be a less effective and appropriate remedy’, and that an enforced divestiture of the Yellow Pages trade mark would be an effective aid to further competition (MMC, 1996c, 33).

### *Yellow Pages*

The Yellow Pages team responding to the investigation was headed by Paul Fry, Strategic Development Director who was involved from the outset and negotiated the final undertakings with the Office of Fair Trading. Yellow Pages has had a history of involvement with the OFT, having first been investigated informally under the Competition Act in the mid 1980s because it had stopped paying commission to advertising agencies. Throughout the 1980s and into the 1990s the company had various correspondence with the OFT about a range of matters. In 1992 the company was subjected to quite a large review about various aspects of its business, including profitability rates, pricing practices and market position. This was also an informal investigation, and no reference is made to it in the 1992 *Annual Report of the DGFT* (OFT, 1993a). In 1994 the company produced its first local Yellow Pages directories and this move too resulted in some inquiries from the OFT. Before the company had the chance to respond to these inquiries it received a letter in early 1995 saying that the matter had been referred to the MMC. The company was ‘aware that [its] competitors and others were pressing the OFT to have some form of investigation’ (int. YP/PF – all further quotes in this section are from this interview unless otherwise indicated), and felt in particular that Thomson was trying to use the OFT to increase its leverage in the market. The sequence of events meant that, at the point at which the MMC began its investigation, Yellow Pages had not committed any resources to defending this particular matter as distinct from the ongoing expense of involvement with, and reference to, the OFT.

The reaction of Yellow Pages to the announcement of the reference was, initially, ‘one of shock’. The company had taken no measures in anticipation of the investigation, but, ‘once the investigation was announced [was] very quickly into shape’. The company was told on 8 February 1995 that the investigation would be formally announced on 1 March, and by that date the structure for handling the investigation was firmly in place. The team structure and arrangements were explained by Mr Fry:

‘We did two things as a company. We appointed somebody, myself, to head the investigation. I would just forget everything, all my other responsibilities to the business, and just focus on leading Yellow Pages through the investigation, and that I would assemble a team as I felt necessary, but the rest of the business had to concentrate on running the business. We had a clear view that we are a successful business and are large enough to be able to say to the rest of the management team we have other objectives we are required to meet so carry on and meet them. Supply support to me as required, as necessary, but be sure that your focus is on delivering this year’s business plan, and my job then was to put together a team to use the trendy phrase, a virtual team I developed. It had one project manager who worked for me full time, and then I used specialists around the business at various stages of the inquiry to perform specific tasks. We do have an in-house solicitor as well, he was for 85% of his time seconded to me.’

This basic management strategy appears to be often adopted, and is mirrored in the approaches of Airtours, Thomas Cooks and Thomson in the Travel inquiry (see Chapter 7). As well as relying largely on the in-house solicitor the company had recourse to the advice of an out-house firm specialising in regulatory issues. The firm in question is staffed in part by former MMC employees, whose advice on the MMC’s likely approach was considered to be ‘very valuable’.



Having been advised that lobbying could 'be highly counter-productive' the company did not do so. The specialist law firm arranged, through economic consultants, for the necessary economic arguments to be developed. Later on, when attention was focused on the 'walking fingers' and 'yellow pages' trademarks the company also took advice from Christopher Morcom QC, which was presented to the MMC at the public interest hearing and was felt by the company to be 'very powerful'.

The dialogue with the MMC was effectively opened when a site visit was arranged at the Reading headquarters of the company for around 12 members of the MMC staff and panel. The company, which was largely able to manage the visit as it wished, had identified aspects of its business that it felt would be of interest to the panel, and was particularly concerned to demonstrate that it added value to the raw data that the BT database gave it access to. This visit was followed by the questionnaire, which the company had already prepared for, its advisors having already developed for it a possible questionnaire based on the common, generic, questions likely to be asked by the MMC. There were few surprises when the questionnaire did arrive, and nothing was asked 'that felt wrong to be asked', although 'some of the questions were rather awkwardly phrased due to ignorance of [the] industry'. The questionnaire posed a considerable burden:

'It was a major job to produce it. We had the data as it were available, but actually turning that into information, and putting the context around that information was the most trying part of it. They asked for information going back 10 years. I hadn't been around that long, and various events had to be put into the context of ten years ago and just presenting the raw data itself was not adequate. And that was the most difficult thing. I think that would be a trying thing for most companies. The peak of resources ran ... from the provision of answers to the questionnaire and then responding to the public interest letter, which is not a dissimilar format so that is about a three month period of peak activity. ... And then we had a writing committee, which involved myself, our external advisors and our MD, we should not underestimate his personal involvement in that. And we sat down and edited the responses and picking over every single word that we wrote.'

Unlike the case in *Travel*, where the companies knew that they operated as a complex monopoly, or *United Automobile Services*, where the issue did not fall to be addressed, the company presented an argument based in part on its contention that it was not a scale monopolist. Yellow Pages argued that at the point of sale it was in competition with local press and other outlets for any firm's advertising expenditure. These arguments required the presentation of detailed economic evidence and research data which were collected by, or on behalf of, Yellow Pages. Results presented in Chapter 8 confirm that where economic consultancies are called upon to present arguments founded on the analysis of market data that material will be prepared by or for the client company, and not by the consultancy itself.

In order to counteract what it perceived as biased approaches by the MMC to advertisers' the company itself contacted selected customers and asked them if they had any favourable comments they would be prepared to make to the MMC. The company 'collected, in the space of three weeks perhaps 700 letters of support'.<sup>8</sup>

<sup>7</sup> Thus the view within Yellow Pages is that: 'the MMC ... wrote to our top 200 customers asking for our views in the industry. And in that questionnaire they included the OFT press statement which talked exclusively about YP and the problems the OFT saw with YP. So it was not surprising that all the MMC got back from the third parties was statements about YP because they had been led down that path. They did not get statements about Thomson's pricing, which we believe is higher than ours, and other practices of other parties. So we were very uncomfortable from the beginning about the fairness of the inquiry, I think in a normal sort of legal situation such leading statements would not have been permitted.'

<sup>8</sup> The company did not disclose how many customers were approached, nor the means by which such customers were selected, or how the matter was presented to them.



Three weeks after the questionnaire had been returned the first hearing was held, for which the company prepared by holding exercises for the staff who would be speaking for the company. The company was 'unimpressed' by the responses of the MMC staff at the hearing, and felt that 'a number of members of the Commission had not thoroughly read the material and were asking questions which were answered in the material very fully'. Three hearings, each lasting one day, were held,<sup>9</sup> and the company became aggravated at the apparent indifference shown by some of the panel members to the company's case and the limitations of having part-time members:

'one member of the Commission spent only half a day at each of the first two [hearings] and didn't attend the third hearing. Another member of the Commission spent only a half day at one of the hearings which struck us as not a substantial time commitment, and I think we took that very personally. We were representing 3,000 employees, whose livelihoods were at stake as we saw it, we took that personally. To see people actually getting up and walking out of your one opportunity to present yourself was aggravating to say the least.'

The hearings were described as 'intense', but not confrontational, although it seemed to the company 'that some of the Commission members had a pre-determined standpoint and were looking for answers that supported their viewpoint rather than objectively looking at all the evidence'.

Mr Fry was asked whether the company would have preferred the reference to be more limited in scope, and whether had there been the offer of a negotiation with the view to obtaining an acceptable undertaking this would have been attractive to the company in lieu of a reference. The position with regards to the scope of the inquiry was clear, and is consistent with that expressed by lawyers interviewed in relation to Chapter 8 below. This is that, while 'competitors were looking for a Competition Act reference' the company itself was 'happier at the end of the day ... an MMC inquiry was better because it did bring out a lot of material about our competitors and about our market place which was not generally appreciated'. The position relating to the acceptance of a hypothetical undertaking was less clear. Obviously the nature of the undertakings would have to have been carefully considered. But other considerations would also have been taken into account:

'it would have depended on how much avoidance we would have obtained. If we had accepted these undertakings that we ended up with, would it have meant that there would have been no further queries or battles about our trade mark for example? If it had really concluded matters in a very long term way then yes it might have been something that we had considered. If it still left the door open on a number of issues then possibly we would have said no, let us lance this boil once and for all.'

A similar approach was taken by Thomson Travel Group in the Travel report, and it appears that companies may welcome the chance to 'clear the air' that the MMC inquiry process permits.<sup>10</sup>

### *Third party involvement*

It has been a feature of MMC reports that they represent a wide range of views, and many people are involved in each inquiry who are not themselves subject to investigation. One aim of

<sup>9</sup> The clarification hearing, the issues hearing and the remedies hearing.

<sup>10</sup> See further Chapter 7.



this particular study has been to consider various aspects of this involvement. Particular attention has been paid to the reasons for this third-party involvement, the extent to which third parties feel that they are able to effectively participate in the process, and the costs to them of doing so. As indicated in Chapter 2 third parties usually fall within two groups: (1) those with a significant level of involvement whose views are reported in some detail; and (2) those whose involvement is very limited, whose interest may be merely acknowledged in the report.

In response to this inquiry 135 parties submitted evidence in one form or another to the MMC, of whom 80 (59.2%) were contacted by way of questionnaire in relation to this study.<sup>11</sup> Some 24 completed returns were made, being 18% of the total number of third parties, and 30% of the sample. The sample was determined by the availability of addresses.<sup>12</sup> No follow-up interviews were held as it was felt that these would not be merited on the basis of the answers provided in the questionnaire.

Question 1 asked how the third party became involved in the inquiry and was designed to establish the extent to which parties came forward of their own volition, in which case it is likely that they will have a strong interest in the matter, or were approached by the MMC. Presented with five choices as to how they became involved in the matter the following responses were made: press or trade advertisement, 2 (8.3%)<sup>13</sup>; the MMC contacted you, 11 (45.8%); report in press or trade press, 3 (12.5%); prior contact with the OFT, 2 (8.3%); other, 7 (29.1%). A variety of channels were indicated by those selecting 'other', including personal contacts with the MMC panel, the intervention of a trade association, and even a request by Yellow Pages themselves. Overall the number of those who were responding to contacts by the MMC (45.8%), suggests that many third parties are not themselves sufficiently motivated to intervene in inquiries, or lack the necessary information, while just over half (54.2%), came forward at either their own initiative, in response to the prompting of another, such as the advertising agency responsible for placing one company's Yellow Pages advertisements, or simply because the opportunity arose. Evidence gathered in relation to the two references relating to the travel industry<sup>14</sup> would suggest that third party intervention is more likely to be vigorous and committed in a well defined industry from those with strong commercial interests, and not from consumers of the reference goods or services generally. It may be a further indication of a lack of strong concern that only five of the 24 respondents (20.8%) have read the published report.<sup>15</sup>

The reasons for intervention given by those who were not first approached by the MMC are various<sup>16</sup> and suggest that many of the parties may not have been aware of the role of the MMC and the purpose of the inquiry. Of the 13 parties who were not first contacted by the MMC five were not familiar with the work of the MMC in general before becoming involved in the inquiry. From comments made by those who became involved, and from an inspection of the limited details provided about third parties who were not contacted, or who did not respond to the questionnaire, it appears that a large number who approached the MMC may have had specific concerns relating to the division of a previously single Yellow Pages area covering Leicester and Derby into two directories. This split required customers to pay for an entry in the directory not covering the area in which their business was based, although their customers may have

11 The questionnaire is reproduced in the Appendix relating to Chapter 2, Methodology.

12 These are not easy to obtain, as the information supplied in the MMC report is incomplete. See further the comments relating to data gathering in Chapter 2, Methodology.

13 The percentages are given as a percentage of the sample.

14 See Chapter 7, below.

15 In fairness it should be pointed out that it is 290 pages long, and costs £22.20.

16 Viz.: 'arrogant attitude of BT'; 'problems with Yellow Pages Directories'; 'dissatisfaction with Yellow Pages owing to not being included in 1995/96'; 'to hopefully get some justice'; 'actions of Yellow Pages was unfair in relation to re-classification of the areas resulting in the doubling of advertising costs'.



traditionally spanned both areas. This was not a matter that the MMC devoted any significant discussion to, and was not found to operate against the public interest.

None of the third parties who submitted evidence would appear to have faced a heavy burden in doing so. Indeed, one member of a small organisation was unable to find anyone who had any recollection of having communicated with the MMC. Only five (20.8%) of the 24 respondents had cause to contact the MMC on more than one occasion. In each case this was in response to a specific request by the MMC following the initial submission, and the MMC made clear the information that it required. In 22 cases (91.6%) the submission was entirely the work of one person. When asked which of the following statements best described the form of their submission respondents gave the following answer:

- a short letter making a general complaint – 3 (12.5%);
- a short letter making a specific complaint – 10 (41.6%);
- a long letter that required a small amount of research to produce – 6 (23%);
- a letter supported with detailed evidence that was already available – 2 (8.3%);
- a letter supported with detailed evidence that had to be researched at length 1 – (4.1%).

When asked to estimate the length of time involved in making the submission estimates varied between a half and three hours. The only respondent indicating that they had had to research at length estimated their time input at only one hour. Only two respondents indicated that they had incurred any costs in making the submission: one of these had derived the figure of £40 by pricing their time (and when asked to indicate any costs several respondents made further mention of their time); the other estimated costs to be 'minimal'. For the two respondents who indicated that more work than just that of one person had gone into the submission the costs do still not appear to be very significant, although Suzuki (UK) Ltd estimated their costs as being between £1,000 and £5,000, and indicated that the matter required a significant amount of work of a few members of staff. The managing director of the Directory Advertising Agency, who replied on behalf of a client (the Automobile Association) estimated the cost of response to the MMC as less than £1,000 responding that it was a relatively minor matter that did not detract staff from other important business.

#### Significant third parties

Several parties gave evidence to the inquiry that was more substantial than the third parties discussed above. Those of most importance are as follows:

- |       |  |
|-------|--|
| OFTEL | OFTEL told the MMC that 'the primary responsibility for dealing with competition issues relating to printed directories rested with the OFT rather than OFTEL' (para 7.2). <sup>17</sup> OFTEL was asked to comment on its involvement in this investigation. However, the office was unable to help as 'due to the high turnover of staff in OFTEL, there is no member of staff remaining who was associated with the relevant submission to the MMC' (letter of 27 February 1997). The letter stated that it was unlikely that significant resources were devoted to the submission. |
| DPA   | At the time of the inquiry the Directory Publishers Association represented 84 British directory and database publishers (BTYP was not then a member although it has   |

<sup>17</sup> OFTEL's role is derived from the Telecommunications Act 1984, and it is responsible for the supervision of directory information services only to the extent that these are covered under the Licence conditions set for each PTO. In September 1997 OFTEL launched a consultation process relating to the Licence conditions (OFTEL, 1997).



- since joined). The DPA secretary at the time, Rosemary Pettit, indicated that the involvement of the DPA was very limited and that it acted only as a conduit for information. It informed its members about the inquiry and invited any comments. The few that were made were then passed on to the MMC.
- Thomson Thomson Directories Ltd was at the time of the inquiry BTYP's largest direct competitor, and made a significant submission to the MMC. Shortly before the end of the inquiry Thomson was put up for sale by its owner US West, and a bitter management struggle for control ensued. The company was unable to participate in this research.
- Kingston Kingston Communications (Hull) PLC, which is a licensee in the Hull area of the Yellow Pages trademark, and publishes a Yellow Pages directory for that area. The company secretary, John Bailey, commented briefly on his company's involvement in the process (see below).
- 'Another' A regional publisher of directories which was an established member of the DPA gave evidence anonymously to the MMC which was reported at paras 7.148–7.156. While it did not prove difficult to establish which company this was, its managing director agreed to be interviewed in relation to this research only on the basis that the same guarantee of confidentiality would be maintained. Accordingly in the section following the company will be referred to merely as 'Another', and its Managing Director will not be named.

#### KINGSTON COMMUNICATIONS (HULL) PLC

Kingston played only a marginal role in the inquiry. The company was not involved in discussions before the OFT, and it first became involved when it received a questionnaire from the MMC. Kingston's main concern was to clarify that it was not under investigation as a holder of the trademark licence, and initially expressed concern to the MMC that the process seemed an onerous one. The company's effort was limited to responding to the questionnaire, and then attending a short hearing before the panel. However, even that limited involvement carried a substantial cost for company:

'We are a relatively small operation and we have to do a multitude of jobs. Filling in a questionnaire, and having three senior managers going down to London for a day in effect to answer questions is no small matter. It was pleasant enough, it was quite stimulating, almost valuable in some senses, but nevertheless quite a heavy commitment' (int. DB (YP)).

The company has noticed a 'very considerable impact' on its pricing as a result of the price-cap on BTYP, as its prices are set in reference to BTYP's, and there is an element of competitive overlap between the Hull and York directories, but apart from that does not believe that the report will have any long term impact.

#### 'ANOTHER PUBLISHER OF CLASSIFIED DIRECTORIES'

'Another' is a well-established regional company, although as with all regional companies it is small compared to BTYP or Thomsons. It publishes four directories and has a turnover of less than £100,000. Its most widely distributed directory has a print run slightly lower than 30,000. 'Another', which competes with BTYP and Thomson 'both on price, geographic area covered, quality, extent and comprehensiveness of information', is concerned that it is 'a small company and any large publisher with substantial financial resources could offer advertising rates significantly below ours to take our existing advertisers and make our operations uneconomic'



(corr., 3 September 1997). The company's Managing Director is candid in his assessment of the company's relative position:

'Good though we may be, Yellow Pages has an unassailable market lead in the minds of potential advertisers. Perhaps the main restriction we find is that we are unable to compete with that, and the difficulty in recruiting, training and recompensing competent advertising sales staff' (ibid.)

In the MMC report this same concern is to the fore. Thus at paragraph 7.152 the MMC summed up one of the company's arguments:

'Consumers saw *Yellow Pages* as the standard reference work and this gave BTYP a strong monopoly position. When selling advertising space, businesses saw *Yellow Pages* as the starting point and other directories as additional expenditure. So in difficult economic times other publishers could feel squeezed compared with BTYP'.

The company appeared concerned however about the possibility of a break-up of Yellow Pages,<sup>18</sup> favouring a system whereby different geographic regions could be offered to the highest bidder under a franchise system similar to that operating in independent television broadcasting (para 7.155).<sup>19</sup>

The company's Managing Director (hereinafter 'Anon') decided to approach the MMC after the inquiry came to his attention through the DPA. While the DPA's newsletter drew its members attention to the inquiry it did not do so in detail, and at the time of the first approach Anon did not know clearly either the purpose of the inquiry or the role of the MMC:

'we knew that the MMC could make binding decisions on Yellow Pages, not necessarily the detail of how that would go about. Certainly we knew that they could do a thorough investigation and at the end of the day come up with a decision that would one way or another bind Yellow Pages to that decision. I am not sure what the legal aspects are, but I am sure they are there' (int YP/Anon).

The company did not approach the MMC with a particular grievance, or in the expectation of a particular solution but out of a more general interest in the industry, and because it 'had information about the North American market that [Anon] thought would be of interest to the MMC'. Following this initial approach, a three page letter which was the result of about an hour's work, the MMC responded and asked for further information, which required only minimal effort to collate. At this point Anon 'did not know that it would turn out to be any more than that', but was then contacted again and asked 'to go to a submission in front of the MMC itself'. At this point Anon sought further clarification of the process and the guarantees of confidentiality that would be given. This concern was driven by 'the potential for [BTYP] ... to use their market influence ... to do very bad damage to us'. Having been given an assurance that the company 'did not have to worry about it at all' Anon agreed to attend the hearing. No further preparation was taken in anticipation of this, 'because it was information that [Anon] already had, or that was researched when [Anon] did the original letter'. The hearing itself lasted about 90 minutes, although as it necessitated a journey to London effectively cost Anon a day away from his business. Travel costs were not reimbursed, although 'it would have been nice if they had been but they weren't offered'. Anon's reaction to the hearing is interesting, and indicates that the MMC did little to prepare him for the process:

<sup>18</sup> Perhaps to a position similar to that in the United States where there are many providers of Yellow Pages directories.

<sup>19</sup> This general threat, which had been identified by Yellow Pages, and was referred to elsewhere in the Report was described by Yellow Pages as 'the meltdown scenario'.



‘As far as the MMC was concerned I was a bit gobsmacked when I walked in there and saw what I was going to be doing the presentation or talking to. ... I think I was probably prepared for there maybe being a couple of committee members there, but there was a lot of other people there as well. There was a large room and I suppose perhaps more formal than I would have expected. ... there was quite a large number of the Commission there, and probably half a dozen or more civil servants there. I was a bit gobsmacked and did not expect it to be anything like as formal as it was’ (int YP/Anon).

Anon’s impression of the quality of the hearing was favourable, and he felt that the members ‘knew what they were doing’. After the hearing Anon’s involvement was limited to being asked to check a draft copy of the relevant parts of the report. Although the MMC did not send Anon a copy of the final report he obtained one and considered it to be ‘very thorough, very good, very comprehensive’. Anon’s reaction to the impact that the undertakings put in place are likely to have is considered below.

### THE UNDERTAKING AND ITS EFFECTS

Concern has been often expressed about the circularity of the process of competition control under the FTA inquiry system. While the MMC is required to make recommendations to remedy conduct that it finds to be against the public interest it is left to the OFT to negotiate, draft, and supervise such undertakings as may be required to give effect to the MMC recommendations. In both this study and that relating to the travel industry the participants were dissatisfied with this process, and believed that it increased the burdens imposed upon them.

In this case BTYP’s concern was expressed clearly by Mr Fry:

‘there seemed to be an atmosphere that Yellow Pages got away with it when we went in, which we did not think was an appropriate view to take ... there were various things that they did not understand. Particularly it came as a surprise that there seemed to be little communication between the MMC and the OFT and the OFT itself was struggling to understand some of the recommendations because they hadn’t all of the detailed information behind them, and didn’t think they could get hold of that information. Which highly surprised us because you tend to view them as one body, in two units. So a large number of things we had clarified to the MMC we had to start again and clarify them to the OFT.’

Following the negotiations, which the company believed to be ‘inefficient’ but did not raise issues that it could not live with, the OFT announced in October 1996 that BT Yellow Pages (BTYP) had accepted an undertaking, the most important aspect of which was a price cap on advertising rates in Yellow Pages. Other undertakings prohibit BT from distributing more than one classified directory in any one area, and require it to publish accounts for its classified directory advertising business. The separate reporting requirement falls some way short of the MMC’s recommendation, not accepted by the Secretary of State, that BT Yellow Pages be established as a separate subsidiary of BT. The advertising price cap followed the recommendation of the MMC, being to the RPI – 2 formula, and is to apply for three years until the autumn of 1999.

The view within BTYP is that the undertaking is unlikely to have a significant impact on the industry, and ‘does not help competition in any way’. Most attention has focused on the price cap, and in this respect, BTYP argues, ‘the report is very much customer based ... the RPI-2 might help advertisers ... it certainly does not benefit competition’. The respondent from the ‘other’ directory publisher had some concerns initially:



‘We do have a small concern about that. If the market-leader’s price is being held down, will it not hold our prices down? However, we have not found any problem. We are increasing our prices in line with inflation. That has been our policy for a number of years. We are continuing to do that and it has not caused us any problems’ (int. YP/Anon).

The impact of the price cap on competition within the industry appears to be limited, and its effect is limited to a transfer of income from BTYP to its customers, increasing the consumer surplus and reducing the monopolistic rent.<sup>20</sup> In the absence of the cap prices would, according to BTYP, have risen by about 5% per annum, or around 1–2% *above* the level of inflation, which is consistent with the trends set out in the research presented in the MMC report (Appendix 3.6–3.7). In the financial year 1994–95 sales of advertising stood at £338 million. On this figure, *ceteris paribus* and assuming RPI of 3%, a rise in prices of 5% would have generated income in the following year of £361 million. However, a rise of 1% would generate income of £341 million, and would therefore see a shift of £20 million from BTYP to its customers. Over the three-year period of the undertaking being effective, and assuming RPI over that period to be between 2.5–5.5% per annum, the net effect of the RPI–2 formula would be to effect a total shift of some £60 million<sup>21</sup> from BTYP to its customers, in relation to a spend over the period of just over £1 billion on current levels.

‘Another’ suggested that the inquiry process had an impact on the more general conduct of BTYP, although could not be certain that this was linked directly to the process itself or to a change in the management team that took place at the same time:

‘It has checked Yellow Pages. I can tell you something I have perceived with ordinary advertisers out there in the field. It used to be that Yellow Pages had a very autocratic attitude. Their reps did and I think Yellow Pages themselves. They have become very much more customer friendly. I have certainly noted a difference since the MMC report was done and I know Yellow Pages have gone over to more customer care than they used to be. ... the BT Yellow Pages organisation has undergone a sea change at about the time of the MMC report. Whether it was that that prompted it or not I don’t know’ (int YP/Anon).

This view was supported in more general terms by Mr Frost, Managing Director of the Directory Advertising Agency, who was also interviewed in relation to this Chapter. No such consideration was voiced by the BTYP respondent.

The relationship of this inquiry to the other two examined in this work, and to the results obtained from the survey of those with repeat experience of investigations is considered further in the Conclusion. Particular concerns arising here are those relating to the efficacy of the undertaking process given the division of responsibilities between the OFT and the MMC; the ability of interested third-parties to effectively participate in the process; the extent to which the questionnaire required a substantial investment on the part of the company; and the concern that the questionnaire was in parts poorly-focused, as the MMC at that stage was still learning about the industry norms.

20 See chapter 3 for a discussion of the relevant economic principles.

21 Any figure given here must be a very crude approximation, and the detailed figures necessary to produce a more accurate figure are not available. Accounts figures for BTYP were excluded from the published report. However, if the assumption is made that the price set by BTYP would have been, as was the long-term trend, RPI+2%, and that demand was price inelastic, a formula of RPI–2% will produce the same result whatever the level of RPI itself.



## Chapter seven — *Foreign Package Holidays*

### INTRODUCTION – THE INDUSTRY AND THE OFT

The Office of Fair Trading re-launched an inquiry into the travel industry in August 1995, following an earlier investigation in 1994 at the end of which the then DGFT, Sir Bryan Carsberg, found that there was no case to answer. There was, initially, little concern about this within the industry. In its 1995 Annual Report Thomson noted that,

‘under pressure from small independent travel agents and tour operators, the OFT examined whether there had been any changes to market practice since their 1994 report. Although they have not yet issued any pronouncements we do not expect any changes in the OFT’s previously expressed view’ (The Thomson Corporation, 1996, 47).

It was reported that the new investigation was a response to concerns ‘that major tour operators may be employing restrictive practices in an attempt to end what one industry insider calls “kamikaze” discounting’ (Tooher, 1995). The level of vertical integration in the industry was also reported to be a matter of concern to the OFT, with smaller firms alleging “directional selling” where the larger holiday firms push their own package tours hard’ (Tooher, 1995). Four undertakings had large market shares and were strongly vertically integrated:

Thomson, the biggest tour operator, owner of the market leading travel agency, Lunn Poly (with nearly 900 branches);  
Airtours, the second largest tour operator, which owns the second largest travel agency, Going Places (700 branches);  
Inspirations, the tour operator, which has commercial links with A T Mays travel agents; and  
Thomas Cook, the travel agent, which owned a 21% share stake in First Choice, the third largest tour operator, and which was to acquire the tour operator Sunworld during the course of the OFT investigation.

Between them Thomson and Airtours accounted for 48% of the travel market. The move towards vertical integration had begun as early as 1972 when Thomson, which at the time had a 30% share of the tour operator market, bought Lunn Poly. In 1995 Thomson Tour Operations was ‘the largest integrated tour operator in the UK and the world’ (Howitt, 1995, 29). Airtours’ major operating brands (Airtours Holidays, Apro, Tradewinds, and Eurosites) are promoted through the group’s travel agency arm, ‘Going Places’. Industry analysis has pointed to ‘the strategic importance of links between tour operator and travel agent [which] secures a channel of distribution for its products’ (Howitt, 1995, 26). The large operators have consistently defended their position, pointing in particular to the possibility of ‘using their marketing clout to gain the lowest possible rates from hoteliers and villa owners’ (Elliott, 1996). In contrast the Association of Independent Tour Operators were unhappy that:



'The big companies have a stranglehold on smaller companies. They demand 19% commission from smaller companies to display their brochures, but only 10% from their in-house companies. This cost is passed on to the customer, which makes independents seem expensive.' (Farrell, et al, 1996)

In July 1996, 11 months after the OFT began its investigation, it was reported that the companies were going to be able to avoid an MMC investigation, and that the OFT would instead 'insist that they be more open with customer about their ownership of high street outlets' (Curphey, 1996a). Some steps to make the links between the agent and the operator clearer had been taken following the earlier investigation in 1994.<sup>1</sup> The deputy finance director of Airtours was defending the company's position on disclosure, arguing 'what we say is that we want to sell you an Airtours holiday and if that doesn't suit your needs we will try and find you another one' (Pratley, 1996). While the Association of Independent Tour Operators expressed concern, the companies themselves 'privately expressed relief that a referral is unlikely, since such a move would be a commercial disaster for them' (Curphey, 1996a). A month later the same reporter was writing instead that 'a split has emerged ... over whether travel companies should be referred' (Curphey, 1996b). Two months further down the line in October the holiday companies were expressing 'concern that the [OFT] is taking far longer than expected to publish its findings' although both Thomson and Airtours were expected 'to give ground to avoid a referral' (Curphey, 1996c). Later in October an OFT spokesman announced that 'we really are nearing the end this time' (Pratley, 1996)

The announcement that the OFT was going to refer tour operators and travel agents to the MMC was made on 7 November 1996 (OFT, 46/96).<sup>2</sup> Reading the press release it is clear that much work had gone into efforts to avert the references being made (OFT 46/96):

1 'Lunn Poly, the biggest travel agent, now displays signs saying that it is owned by Thomson, which accounts for almost a third of the holidays sold in Britain. Going Places has also put up signs stating that it is owned by Airtours, the second largest operator.' (Pratley, 1996)

2 The full terms of the reference are as follows:

FAIR TRADING ACT 1973 ('the Act')

REFERENCE TO MONOPOLIES AND MERGERS COMMISSION SUPPLY OF TRAVEL AGENTS' SERVICES IN RELATION TO FOREIGN PACKAGE HOLIDAYS

The Director General of Fair Trading, in exercise of his powers under sections 47(1), 49(1) and 50(1) of the Act, hereby refers to the Commission the matter of the existence or the possible existence of a monopoly situation in relation to the supply in the United Kingdom of Travel Agents' Services in relation to Foreign Package Holidays.

The Commission shall investigate and report on the questions whether a monopoly situation exists in relation to such supply and, if so,

— by virtue of which provisions of sections 6 to 8 of the Act that monopoly situation is to be taken to exist;

— in favour of what person or persons that monopoly situation exists;

— whether any steps (by way of uncompetitive practices or otherwise) are being taken by that person or those persons for the purpose of exploiting or maintaining the monopoly situation and, if so, by what uncompetitive practices or in what other way;

— whether any action or omission on the part of that person or those persons is attributable to the existence of the monopoly situation and, if so, what action or omission and in what way it is so attributable; and

— whether any facts found by the Commission in pursuance of their investigations under the preceding provisions of this paragraph operate or may be expected to operate against the public interest.

For the purposes of this reference:

'the Commission' means the Monopolies and Mergers Commission;

'Foreign Package Holiday' means a Package of which the components include:

transport between the United Kingdom and a place outside the United Kingdom; and

accommodation outside the United Kingdom;

'Package' and 'Retailer' have the same meaning as they do in the Package Travel, Package Holidays and Package Tours Regulations 1992; and

'Travel Agents' Services' means the services of a Retailer in his capacity as such.

The Commission shall report on this reference within a period of 12 months from the date hereof.



'Following a detailed review of the travel trade, the Director General decided in July that monopoly references would be justified. There have since been protracted and detailed discussions with Thomson and Airtours, the two largest travel companies, to see whether undertakings could be secured which would, in the Director General's view, avoid the need for a reference.'

Despite the attempt to negotiate acceptable undertakings the DGFT was not satisfied with the arguments advanced by the companies (OFT 46/96):

'To avoid a monopoly reference I need to have acceptable undertakings from all parties involved. It has become clear after many weeks of discussions with Thomson and Airtours that this is not going to be possible. I believe that the only way now to address my concerns over these practices is to ask the MMC to investigate their effects on competition and the public interest.'

Following the making of the reference it emerged that the leading companies, Thomson and Airtours, were not united in their approach to the OFT. David Crossland, chairman of Airtours, was reported as blaming Thomson for the failure to agree terms with the OFT, arguing that 'Airtours was prepared to put in writing all the undertakings that the OFT was looking for'. Thomson in turn was prepared to accept undertakings relating to disclosure about links between the companies, but was not prepared to accede to other demands made by the OFT (Farrell, et al, 1996).<sup>3</sup> Noel Josephides, former Chairman of AITO and a regular columnist with the trade

*Contd*

#### FAIR TRADING ACT 1973 ('the Act') REFERENCE TO MONOPOLIES AND MERGERS COMMISSION

##### SUPPLY OF FOREIGN PACKAGE HOLIDAYS

The Director General of Fair Trading, in exercise of his powers under sections 47(1), 49(1) and 50(1) of the Act, hereby refers to the Commission the matter of the existence or the possible existence of a monopoly situation in relation to the supply in the United Kingdom of Tour Operators' Services in relation to Foreign Package Holidays.

The Commission shall investigate and report on the questions whether a monopoly situation exists in relation to such supply and, if so,

- by virtue of which provisions of sections 6 to 8 of the Act that monopoly situation is to be taken to exist;
- in favour of what person or persons that monopoly situation exists;
- whether any steps (by way of uncompetitive practices or otherwise) are being taken by that person or those persons for the purpose of exploiting or maintaining the monopoly situation and, if so, by what uncompetitive practices or in what other way;
- whether any action or omission on the part of that person or those persons is attributable to the existence of the monopoly situation and, if so, what action or omission and in what way it is so attributable; and
- whether any facts found by the Commission in pursuance of their investigations under the preceding provisions of this paragraph operate or may be expected to operate against the public interest.

For the purposes of this reference:

'the Commission' means the Monopolies and Mergers Commission;

'Foreign Package Holiday' means a Package of which the components include: transport between the United Kingdom and a place outside the United Kingdom; and accommodation outside the United Kingdom;

'Organiser' and 'Package' have the same meaning as they do in the Package Travel, Package Holidays and Package Tours Regulations 1992; and

'Tour Operators' Services' means the services of an Organiser in his capacity as such.

The Commission shall report on this reference within a period of 12 months from the date hereof.

3 The Pennington column in *The Times* noted the disarray:

'It is hard to reconcile the versions of events given by Airtours and by Thomson Holidays, while the OFT is maintaining a suitable silence over the confidential negotiations that led to its decision. ... Airtours was happy to accept the required undertakings but Thomson was not – probably because they appear to have been a completely different set for each company. Airtours was asked to make sure customer knew of the common ownership between the product they were buying and the shop they bought it in – they are already told quite explicitly – and to promise not to use its clout to fix prices. Thomson's interpretation of these undertakings was the virtual creation of a holiday industry regulator, a veritable Ofhol, fixing prices and setting almost all the terms under which the companies are allowed to contract with their suppliers. Yet the OFT says the undertakings put to each were identical. The answer is in the interpretation; Thomson was unwilling to accept any interference, and so took the bleakest possible view. It is now up to the MMC to sort it out.' (Pennington, 1996a)



journal *Travel Weekly*, explained that 'the two market leaders think very differently ... Airtours is extremely upset with Thomson that the thing got referred anyway, quite justifiably' (int. NJ). Later it emerged that 'the real sticking point ... was over commission and brochure racking<sup>4</sup>', and that both companies had 'steadfastly refused to give in to the OFT over the commission rates they charged' (Curphey, 1996d).

The two references made to the MMC required the examination of (1) the supply of travel agents' services; and (2) the supply of tour operators' services. Particular attention was drawn to the level of vertical integration in the industry,<sup>5</sup> and to the 'widespread practice of linking travel insurance with holiday discounts' (OFT, 46/96).<sup>6</sup> The decision to refer the matter to the MMC was widely reported in the press (see, e.g., Farrell, et al 1996; Marston, 1996; Elliott, 1996; Pennington, 1996) and the companies concerned, after expressing 'disbelief' (Elliott, 1996) were quick to defend their position.<sup>7</sup> David Crossland suggested that consumers were reaping the rewards of intense competition in the industry:

'The consumer has benefited from big players like us being able to keep the cost of holidays down by buying aircraft, hotels and cruise ships. This move by the OFT has not come from customers complaining about prices.' (Farrell, et al, 1996)

An Association of British Travel Agents' (ABTA) conference held the week before the OFT announcement had heard that the number of holidays sold by the 'big five' operators had fallen by 5% to 61% of the market total, and that the smaller and independent travel operators share of the market was, therefore, growing (Elliott, 1996).<sup>8</sup> The market reaction to the reference was immediate and the share value of Airtours fell by 12% (Pennington, 1996), with First Choice being similarly affected (Clark, 1996); the parent company of Thomson (The Thomson Corporation, of Canada) had to put on hold plans to float or sell off Thomson (Curphey, 1996d). The companies themselves, however, expressed confidence in the eventual outcome, and by November the market appeared to be rethinking its stance and taking a 'sanguine' view of the referral, which one analyst dismissed the referral as 'a complete irrelevance' (Wall, 1996). Thus in Airtours' Annual Report the following paragraph appeared:

'We are confident that the MMC will find that the industry is competitive and that the UK tour operating market offers the consumer the widest choice of products and the best value for money to be found anywhere in the world' (Airtours plc, 1996, 3)

4 Brochure racking relates to the ways in which brochures for the various operators' packages are displayed in the retail outlets. A typical high street travel agent would have between 100 and 150 brochures on display, with as many as a further 400 in stock. With vertically integrated operators the fear of the Association of Independent Tour Operators is that preferential display treatment is given to the brochures of the related tour operator, to the exclusion of other suppliers.

5 'The vertically integrated groups now supply a large proportion of this £7bn market. I believe they have the market power to put competitors at a disadvantage for example by de-racking or threatening to de-rack their brochures in an attempt to negotiate larger commissions, by pressurising tour operators not to supply independent travel agents on better terms, or by pushing their own holidays through in-house incentive schemes.' (OFT, 46/96)

6 The Consumers Association produced a report which suggested that 'insurance purchased to guarantee a holiday discount often costs twice the normal rates' (Marston, 1996).

7 The concern felt about the negative public relations impact of MMC/OFT action is considered in Chapter 8, below.

8 It was later reported that 'the culmination of all this competitive activity was the disastrous trading year of 1995, the worst in the industry for a decade. Operators found themselves with three million unsold holidays to shift. Profits plunged and operators, sadder and wiser, vowed in future to try to match supply with demand'. (Pennington, 1996b)



## THE MMC INVESTIGATION

That the response to the MMC investigation would be vigorous was never in doubt. In December 1996 it was reported that Airtours had 'set aside £1 million and three full-time members of staff' to cope with the demands of the MMC referral and that 'the bulk of the costs would be fees charged by lawyers and economic advisors' (Curphey, 1996e). The travel companies looked with concern to the structural remedies imposed in the beer industry, and Airtours at least saw the possibility of an enforced divestiture as 'an Armageddon scenario'.

As already noted the crucial issue considered by the MMC in this case was the impact of the vertical restraints in the industry. The work of Dobson and Waterson is relevant in this context:

'The strongest case for efficiency gains is based on situations where the retail service provides an input into the perceived quality of the good and/or an important source of reliable information for the consumer on products, about which he/she otherwise has only limited information. However, it may be precisely these cases where manufacturers wish to pay for the exclusive services of established/reputable retailers to foreclose rivals when it is difficult to establish a competitive rival distribution system' (1996, 56).

The major travel firms that formed the focus of the inquiry clearly have all been able to develop rival distribution systems, but there appears to be some evidence that small, independent retailers are indeed, as Dobson and Waterson suggest, 'forced to use an inefficient distribution system' (1996, 19). Certainly that was the view AITO presented to the MMC.

The MMC report was published in December 1997, and was widely reported in the general press. The accompanying press release<sup>9</sup> focused on possible reduction in prices, and suggested that the result was a success for Margaret Beckett.<sup>10</sup> The report's conclusions are summarised at para 1.7:

'We identify a number of practices in the trade which distort competition. These give rise to two complex monopoly situations within the meaning of the Fair Trading Act 1973, one concerning tour operators and the other travel agents. There are three practices which we find to be against the public interest: the tying of travel insurance to the purchase of discounted holidays; so-called 'most favoured customer' clauses, meaning provisions in an agreement between a tour operator and a travel agent which effectively require the travel agent to offer the same discounts on that tour operator's foreign package holidays as it does on other tour operators' holidays; and failure to take sufficient steps to ensure that consumers are made aware of the ownership links between vertically integrated tour operators and travel agents. The first of these practices is widespread throughout the trade. The second and third practices concern certain of the players within the vertically integrated groups.'

The vertically integrated monopolists drew comfort from the conclusion that:

'At current levels of integration in the tour operator and travel agent markets, we believe that the anti-competitive effects of vertical integration are slight. It should

<sup>9</sup> The Press Release is attached as an endnote to this chapter.

<sup>10</sup> Thus a selection of various headlines is as follows: 'Let the sunshine in: tour firms are told to open up on discounts' (1997) *Daily Mail* 20 December; 'New rules cut holiday prices' (1997) *Express* 20 December; 'Travel agents must mend their ways' (1997) *Guardian* 20 December; 'Beckett promises cheaper holidays' (1997) *Times* 20 December; 'Package holiday prices to fall' (1997) *Daily Telegraph* 20 December; 'Holiday links to be exposed' (1997) *Financial Times* 20 December. The *Independent* struck a more cautious note. Under the headline 'Holiday firms escape travel agency sell-off' (1997) 20 December, it led with: 'Britain's main package holiday companies were given an early Christmas present yesterday when the year-long competition inquiry into the travel industry asked for only minor changes. Although the Government claimed its measures would mean lower prices for consumers ... the real winners are likely to be the big tour operators'.



be noted that we have received very little complaint from customers about the value for money of foreign package holidays or other evidence of consumer dissatisfaction. Accordingly, we have not found that there are sufficient grounds for condemning vertical integration as a whole in the travel trade' (para 1.10).

### *The study*

This investigation differs from that considered in the previous two chapters in that it related to the conduct of a complex monopoly, and thus was affected by the interplay between the main parties subject to the inquiry. For the purposes of this study the focus was on two of the travel operators subject to the reference, Airtours PLC, and Thomas Cook. The retail travel and tour operator sector is a dynamic one, and during the course of the inquiry Inspirations was acquired by Carlson Leisure Group (UK) Ltd. Carlson is a 'private' company and the management team at Inspirations responsible for the response to the inquiry was instructed not to cooperate in this study.<sup>11</sup> Thomson Travel Group (TTG), the largest of the operators and the only company with a scale monopoly, participated to a more limited extent than Airtours or Thomas Cook. First Choice, the final significant operator, did not respond to requests for information. The information given by the three responding companies substantially accords with that provided by the main players in the two prior chapters, and there are no grounds to believe that these experiences differ significantly from those of First Choice or Inspirations. The strategic interplay between the parties, and the effect that this may have had on the process of the inquiry is dealt with in some detail by the three parties.

Information was also provided by the Association of Independent Travel Operators (AITO), which was credited by the subjects of the inquiry with driving the reference, and whose successful lobbying was admired, if not appreciated. AITO remained involved throughout the process, through to the stage of making representations to the DTI regarding the nature of the undertakings that should be put in place to implement the recommendations made by the MMC and accepted by the President of the Board of Trade. The Consumer's Association also spoke specifically about this investigation during the course of an interview that is discussed in more detail in Chapter 8.

No other third parties were contacted in relation to this inquiry. The evidence accumulated in the previous two chapters is consistent and there are no grounds for believing that the pattern or level of participation would be any different in this case.

### *Airtours*

Airtours, along with Thomson, was involved in the investigation from the outset, and views it as one continuous process going back to 1994 when Sir Bryan Carsberg had an investigation following which he found that there was no need to intervene further in the market. In August 1995 the OFT launched another inquiry, and requested a small amount of statistical and factual information from the company. Responding to this was 'quite straightforward', and the questions focused on the issues which were subsequently highlighted in the referral: vertical integration, racking, commission structures and the insurance link. The company was surprised when in July 1996 it was told that the matter was going to be referred to the MMC. At that point the company

---

<sup>11</sup> Letter to the author, 29.1.1998. The company also acquired the AT Mays chain of travel agents.



immediately contacted the OFT and was able to arrange a meeting and made it clear that it was 'prepared to consider giving certain undertakings in order to avoid the expense and nuisance and all the rest of it of the inquiry' (int. DB[1]). Airtours felt that it was making progress in these negotiations, but that Thomson

'came to the conclusion for a number of reasons that they felt it better to have a full inquiry, and basically do it, get the result then park the issue for another ten years. And they were completely against giving any favourable commercial terms in an undertaking' (int. DB[1]).

By the time the OFT abandoned the attempt to negotiate undertakings Airtours

'had indulged them and spent an enormous amount of time and resource because [they] realised that an MMC inquiry is not going to earn this company a penny. It will be a pain. It will be disruptive and it will direct peoples' focus away onto other things' (int. DB[1]).

When the referral was made the company appointed economists, and had already briefed Slaughter and May when the matter was before the OFT. Internally the response involved largely three people, and the primary responsibility was placed on a business analyst with an accounting background who was 'put in an office and told "do nothing else for the next year but the MMC"' (int. DB[1]). The company's response was largely shaped by Roger Davies, who was on the Board of Directors and had previously been a MMC panel member.

The questionnaire took four months to complete, although the company was working on likely responses and data collection from the moment the reference was made, and had the work finished six weeks before the MMC deadline. It found the opportunity to comment on the draft particularly helpful, 'because the first cut was the kitchen sink' (int. DB[1]), and found the MMC receptive to suggestions for refinements. The approach that the company took, and the reasons for this approach were given as follows:

'cynically I suspect that much of the stuff that goes in the questionnaire, other than for the secretariat will never be read by the Commissioners. But they will read the submissions. They will read the overviews. And that is what you pay your advisors for really. The ability to articulate your industry in a concise and brief format that is persuasive. We did have the view at one time to run what you might call a minimalist approach to this, don't bother with advisors, we know our business, get the questionnaire, answer it to the extent that you are required to answer it by law, don't try and make it easy, don't bother doing any overview or submission, because whatever result they decide to impose or don't on Thomson we get the benefit of it. Because they are actually a scale monopolist in the UK, by dint of their market share sizes. So whatever is going to be imposed on them we are going to pick up as well. The only thing is it is a very high risk strategy when you have invested some £70, £80 million pounds in a retail distribution chain' (int. DB[1]).<sup>12</sup>

The company found the MMC to be reasonably flexible in relation to the material it wanted, and would accept it if the company could not readily provide information in the format requested in the questionnaire. Following the completion of the questionnaire drafting meetings were held involving the senior management team which would be involved in the subsequent hearings. The MMC did not require substantial further information from the company, although a single clarification hearing was held in relation to some of the definitions used in the questionnaire.<sup>13</sup>

<sup>12</sup> The free riding approach is considered also briefly in relation to the approach by Thomas Cook, below.

<sup>13</sup> This issue is considered further in relation to Thomas Cook's response, below.



Prior to the hearings the company held 'some fairly fierce rehearsals' on the basis that for 'those who truly ran the business ... this was going to be a very important part of their life but would take only one day so they had to be well prepared' (int. DB[2]). At the hearings 'the questions and answers were taken 95% by [Airtours staff]' (int. DB[2]), although the company was supported by its solicitor and Lexecon. The full hearing lasted one day, and the remedies hearing a half day. The five members of staff involved would each have spent a further two or three days preparing intensively for the hearing, and would have reviewed all material previously given to the MMC. The company was impressed at the approach of the MMC at the hearing, and thought that 'they asked pertinent questions' although some of the analysis in the final report 'was a bit skimpy' (int. DB[2]).

The company does not believe that the report and undertakings arising from it will have a significant impact on the industry. Prices will not drop, because they are determined by supply and demand, nor will the number of operators or agents increase. The company's view which is supported elsewhere, is that the industry is a very dynamic one, and that entry and exit will be determined by market forces and will remain fluid. Thus the response to the report was summed up as follows:

'from our perspective we don't believe that there is anything in here that is actually going to financially impact us or alter the way we do business. In fact quite the reverse. It actually means that we don't have to live with the uncertainty when we are looking at other potential targets that we may have done prior to the MMC inquiry' (int. DB[2]).

Overall Airtours estimates that the inquiry cost the company slightly more than £1 million, which represents

'all the costs we have incurred throughout the group as well as those of general overhead carry as well as the lawyers' fees. By far and away the lawyers' fees are the big bulk. Particularly in our case. But that is just the way we have conducted it' (int. DB[2]).

The company may have received some small benefit from the inquiry, beyond the fact that it believes that it can now operate with more commercial certainty. In particular the company has improved its management information gathering as a result. However, the process has not resulted in 'changing commercial practices or understanding our business any better' (int. DB[2]). The company has been unable, at the time of writing, to conduct a full cost assessment of the likely impact of the implementation of the undertakings, although it does not anticipate that this will be significant. The only direct cost will be in the disbursements necessary to change facias, although this would be going on over time in any case. There may be an impact on brochure production costs if links are to be explained by way of a direct printing rather than by placing a sticker on the brochure. The negotiation process has been one that the company has found frustrating, and it would much prefer to see a change in the institutional process at the end of the report:

'[DB] It is clearly wrong. The best people to deal with, shall we say the remedies, have to be the people who spent a full year investigating it, rather than those who are susceptible to whatever they might read in the press tomorrow, and who already have got a predetermined fixed view of our industry. Because that is why they sent it off to the MMC in the first place. There is no question about that it is a costly duplication of effort and time.

[M] One of the problems we have now is because the people who draft the remedies



are not responsible for enforcing them they are still talking in principles at some points rather than in practicalities of application.

[DB] You have the DTI coming up with what the OFT are having to enforce. This comes back to the arguments for one competition authority which seem to me to be overwhelming.'

### *Thomas Cook*

Like Airtours, Thomas Cook appointed a project manager to lead the administrative response to the MMC inquiry. The role of Richard Price, a member of the corporate finance department, was

'to manage the whole project from start to finish, managing resources below as well as above and actually meeting the timetable, gathering appropriate data, making sure that generally we are prepared and can respond appropriately to the inquiry itself' (int. RP).

Thomas Cook was only marginally involved in the matter before the OFT, having, like the rest of the industry, stood on the sidelines and watched while the OFT attempted to negotiate with Airtours and Thomson. The involvement at that stage was limited to 'responding to a few inquiries' from the OFT in January 1996. The company did not expect to be involved in the process any further, but believed that if it became involved in a general reference that there would not be any radical changes. When the company became involved following the making of the reference the reaction 'was not one of disappointment or dismay. Just an identification that there was going to be a significant burden put on the company. ... it was a case of "what does this mean to us"' (int. RP). The company accepted from the outset that the MMC would find a complex monopoly to exist, and considered therefore that it had an equal stake in the outcome as the other vertically integrated operators. The company accordingly engaged both the services of a legal team from Field Fisher Waterhouse, a QC, and an economic consultancy to support arguments made about the impact of vertical integration. At no point did it co-ordinate its approach with, or discuss the matter with, the other companies, and its approach was not influenced by the prospect of strategic interplay. The company was 'briefly approached by one other company in relation to one specific matter and declined to actually do it'. However, the existence of other players is a factor that influenced the approach. The company has

'tried to co-operate with the inquiry, at the same time recognising that there are likely to be players within the market, or in the industry who are going to dedicate more resource, more effort to promoting their own particular case and we may be able to free ride on the back of that' (int. RP).<sup>14</sup>

The company first received the draft questionnaire, and made some comments on it. By the time the final questionnaire arrived six weeks later it felt that 'clearly between the draft questionnaire and the final questionnaire there was a much more complete understanding of the way the industry works' (int. RP). However, there appeared to be a general feeling within the industry that the MMC 'could better have utilised information [obtained from the OFT] in putting together the draft questionnaire' (int. RP). Although not many changes had been made they were significant

<sup>14</sup> The question of the extent to which companies may be able to free ride in inquiries is considered further in Chapter 8, below. The general view appears to be that this is a risky strategy as not all participants in an inquiry may wish the same result, and may be differentially affected by the same outcome. Accordingly professional advisers do not advise reducing the commitment to advancing a particular point of view on the basis that the arguments may be made equally effectively by other parties.



in terms of the volume of questions. The company found the MMC to be flexible in its approach, which eased the burdens in completing the questionnaire. There were questions for example as to the definitions of certain terms, and 'there had been some debate apparently between some of the principals as to what they meant, so the [MMC] left it relatively open and said fine, define what you believe the term to be and then respond accordingly' (int. RP). Nevertheless, responding to the questionnaire required:

'a huge amount of effort. A really huge amount. Having spoken to a couple of professional advisers they said this is the largest questionnaire they had seen.<sup>15</sup> ... There were more than 200 questions, and if you think some of those could have anything up to seven or eight parts I think overall there were probably close to 1,000 questions, and where they require factual data some of those questions refer to a five year period, which makes it particularly onerous to gather that data because we don't necessarily have that data to hand, there are changes within the organisation and organisation structure which make it difficult to consistently analyse that data, let alone get hold of it in the first place. It was a particularly onerous document to complete' (int. RP).

Completing the questionnaire took between 70 and 100 full days' work for Mr Price, about 30 days of work for the professional advisers, 35 days of senior management time collectively across the organisation, and about 20 days of junior staff collecting the raw material, the total as Mr Price noted, 'a large effort from the organisation's point of view'.

The oral hearing involved further preparation, although the workload was not nearly as intensive as it was for the questionnaire. The company was represented by a QC at the hearing, whose input was 'important to the overall inquiry, although his involvement has been kept to a minimum, largely because of cost restraint'.<sup>16</sup> Unfortunately the company was not able to comment on the later stages of the process or the likely effect of the remedies proposed. It was known however, to be involved in intensive negotiations over the re-branding issues. Thomas Cook is owned by West Deutsche Landesbank, and at the time of writing it is not clear what form of words will be used to indicate its commercial links in its sales outlets.

### *Association of Independent Tour Operators*

The Association of Independent Tour Operators (AITO), which represents specialist tour operators, was, as noted above, the prime source of the pressure placed on the OFT to review this market. Thus Airtours noted that it was AITO 'who are largely credited with getting this matter referred due to their persistence and very good lobbying by ... Sue Ockwell' (int. DB[1]). AITO has throughout the process adopted a very high-profile role, and has frequently pressed its views in the media, as well as playing a part in the official process. The organisation has looked to the MMC investigation and subsequent report not only to provide direct remedies, but also as a tool in a promotional battle with the majors. Noel Josephides, who was Chair of AITO at the time that they began to put pressure on the OFT, explained the strategy:

'we decided that we would approach the OFT and make it an issue with the OFT and bring it to the public's attention ... although we knew that we were going to have a problem in getting it across ... we assumed that if we were successful in doing so, no matter what the result with the OFT, if it was referred, or not or

<sup>15</sup> Airtours' view was that 'its about average size' (int. DB[1]).

<sup>16</sup> As is clear from the responses gathered in Chapter 8, it is now unusual to rely on the services of a QC in MMC inquiries.



whatever the result of the MMC inquiry we have had so much publicity as to the failure of the multiples and their policies that we would have achieved our aim anyway. ... we have had so much positive press coverage ... that in a way we have already achieved what we set out to do' (int. NJ1).

This fact has had a significant impact in particular on the response of AITO to the release of the report and the accompanying press release.

AITO, who were represented throughout the inquiry by Sue Ockwell, Managing Director of Travel PR and a board member of AITO, had been pressing the DGFT for two and a half years to hold an inquiry, and had held a number of meetings over that period with the OFT. It was difficult for AITO to provide the OFT with sourced information in a market where the smaller companies making private complaints are dependent on continued links with those about whom the complaints are being made. Thus:

'It was difficult to get information, any little thing can get hold of we have been grateful for. ... [this letter] is the sort of thing that is like gold dust, trying to get hold of that, because they tend to have screens and nothing prints out at the other end, so you can't find a mole who will be effective and geed you information. ... We were very lucky but had very little. The OFT and the MMC seemed to think that of course there must be stuff, and of course people will give it to you. But people will complain about it and talk about it, but they are very nervous about doing anything else, for fear of losing their job' (int. AITO 1).

AITO's main tactic was to lobby in the media, believing that this would be a more effective route than applying pressure directly on the OFT. The organisation also found the official bodies and process 'very untransparent' and was frustrated at its inability to compete with the large companies and in particular with ABTA and the Federation of Tour Operators. The organisation was nevertheless surprised when the reference was made, and first approached its legal advisers, who had already been retained on behalf of Thomas Cook. Following press coverage of Airtours' chairman's statement that the company had set aside £1m to cover the costs of the inquiry AITO became concerned as to the effectiveness with which it would be able to press its case, and turned to Ms Ockwell's sister, Helen Porter, formerly a solicitor with Mars UK who had been involved in that company's competition law affairs, which were considered by the MMC, the Irish courts and the EC Commission. The approach was set out by Ms Ockwell as 'very much a homespun thing, and we were suitably impressed and alarmed when we saw in the press that Airtours had put aside £1m to work on it'.

AITO were asked for their views by the MMC in 'quite a peculiar letter ... a one and a bit page letter with a couple of points raised in it' (int. AITO 1). At the same time as AITO was preparing its response the MMC conducted a telephone survey of travel agents and tour operators which included many of its members.<sup>17</sup> AITO's response 'took a serious amount of time' with the bulk of the work being done by Ms Porter. AITO was charged £15,000 for the work, although had outside advice been sought 'we would have had to spend about £50,000 or £60,000 for the same amount of work'. The organisation was very concerned about its ability to match the input of the large companies, and was particularly concerned at the MMC making references to economic arguments and to its approach to evidence. The approach was to 'just [have] the best bash that we could with the funds', which were raised from the members, applying a levy. There was

<sup>17</sup> AITO was critical of this survey, and felt that the questions did not address the correct issues and did not show a deep understanding of the travel industry. The organisation would have liked the chance to comment on the questionnaire prior to it being undertaken: 'We could have tried to balance it by asking the other side and using an element of common sense. They should have asked advice and they didn't. They did not tell us what they were going to do at all. They did ask us about some bigger questionnaires and we did feel that we had the chance to make comments which were then considered in relation to these. The telephone survey though was crazy' (int. AITO 2).



some resistance to paying this, even though at the lower level the minimum requested was £60, rising to £220 for the larger members. The summary of AITO's recommendation to the MMC was in the following terms:

'AITO urges the MMC to recommend action to remedy various structural defects – fundamental restructuring through disinvestment by the vertically integrated companies so that they no longer have a stranglehold over the supply of aircraft seats, or the supply of travel agency services. At the very least the vertically integrated groups should be required to divest themselves of one or more of their businesses so that they do not own more than one, or at worst, two out of three elements, i.e. airlines, operators, travel agents. Forcing the companies to publicise their links will not be enough to protect the market place' (letter to MMC read out at int. AITO 1).

When asked if AITO had needed her legal expertise and advice, Ms Porter's response was emphatic: 'they certainly did. Although they were good and had a lot of information they did not know what the issues were and they missed the legal points' (int. AITO 2).<sup>18</sup> Ms Ockwell too was clear as to the benefit, and pointed to two factors: 'you needed a very organised approach and the experience of working with documents that a lawyer has. And I had a job anyway ...'.<sup>19</sup> AITO was of course in an exceptional position in having access to this service at minimal cost, and its experience in this respect placed it in a privileged category when compared to other smaller third parties.

It is clear that third parties without significant expertise and advice in this area find MMC hearings daunting, and are often unsure as to what is expected of them. Although this point was made very clear by 'Another' in the previous chapter, a similar concern was raised by Ms Ockwell, who 'found it quite daunting' in particular 'when the MMC began talking about economics and economic evidence and I thought ... how are we going to cope with this' and was 'quaking before [she] went in'. Her sister on the other hand found the experience to be 'not a court-room situation at all, not at all intimidating'.

Asked what would be the likely effects on its members of the imposition of the remedies suggested by the MMC<sup>20</sup> Ms Ockwell was unable to be certain, noting that 'whether it is good for our members or not only time will tell'. One benefit that AITO sees as flowing from the report is that it will be of use as a benchmark against which to judge the movements in the industry, and only three months after the report's publication was looking ahead to the possibility of future agitation for changes in the industry. AITO was asked by the DTI to comment on the proposed remedies,<sup>21</sup> and in doing so broadly welcomed the proposals advanced by the DTI, particularly those relating to the insurance/discount link.<sup>22</sup> AITO's response to the question: 'Will there be

18 Ms Porter clearly enjoyed the experience of working in such a close relationship with her client: 'I found it helpful being able to come here and have a very close relationship with the client, rather than doing everything at arm's length. And I just came here, got all their documents and read it all. I think in fact it was easier to write the report because I had such good access. ... You don't have anyone else to go to, and have to really think about your client and it is much easier just to ask questions' (int. AITO 2).

19 The latter problems were also highlighted by Mr Guest (Chapter 5), and 'Another' (Chapter 6). It seems clear that third parties find the task of providing the MMC with appropriate information on top of managing what are often much smaller and resource constrained businesses a difficult one.

20 And see the proposed terms of the Order set out in the Press Release (endnote).

21 The response was set out in a letter of 11 February 1998. A copy has been given to the author.

22 Viz.: 'We thoroughly support the move to make it unlawful for a travel agent or a member of the travel agent's group to require a customer to purchase travel insurance as a condition of supplying a discounted foreign package holiday. We think that consumers will understand pricing structures better as a result and, indeed, will enjoy better deals in future as a result since tied travel insurance invariably equated to much-overpriced travel insurance.' In August 1998, following the consultation process begun in the previous December, the DTI finally moved to prohibit the tying of insurance to holiday sales (*The Guardian* 11 August 1998)



any unintended adverse effects on the travel industry?' is a positive one: 'As far as we can tell, effects should be positive from the consumer's perspective'.

AITO expressed dissatisfaction with the process following the conclusion of the report. It was dissatisfied both with the way the report was released, on the last Friday before Christmas with the organisation being given no prior warning and heralded via a press release that it believes is more favourable to the complex monopolists than is the report, and with its level of involvement in the review of remedies. Asked if AITO felt involved in that process Ms Ockwell's response was as follows:

'No. I spent quite a bit of time with [the DTI] but we very much had the impression that nothing was going to happen. We got our letter in by 11<sup>th</sup> February, the deadline. We have had an acknowledgement but nothing more than that. Here we are in the middle of March and we have no idea of the timescale, of what is going to happen. It does seem crazy that nothing has happened after so long. We would at least like to be given an idea of the timetable of the process. We are just left flapping in the air and I don't think that is altogether satisfactory. People don't know what is happening with their own case. It is exactly the same way in the process by which the thing came out.'

It is clear that AITO, at a direct cost of some £15,000 and the investment of a lot of time, feel that their goals in bringing this matter to the attention of the OFT have to a large part been achieved, although this has not been a direct result of the MMC's approach to the market, and has instead been largely effected through the attendant publicity. This view is not shared by Airtours, which has noticed no adverse impact on its business, and believes that the vast majority of the public are unaware of either the inquiry process or the general issues surrounding it.<sup>23</sup>

## CONCLUSION

The investigation of complex monopoly situations raises particular problems,<sup>24</sup> and imposes burdens across the industry that are not necessarily balanced in as much as those at the margin are likely still to invest heavily in representing their position. All companies, whether scale or complex monopolists, receive the same questionnaire, and it may actually be the case that smaller companies find this more burdensome than their larger co-monopolists. In this case, for example, it appears that Thomas Cook, which had less experience of the demands of the regulators than Airtours, found the process more difficult and demanding than Airtours. It is also apparent that companies in this position do not feel able to free-ride on the submissions made by the more central players. In fact strategic considerations appear more likely to increase the workload generated than they are to reduce it. While Airtours recognised that there might be benefits in taking an industry-wide approach to matters such as market analysis and statistical evidence the company made it clear that its professional advisers would not countenance such a move, and that any such steps would be inimical to the individual interests before the MMC. It is an anomalous position that companies are likely to be found to be complex monopolists, and sucked into an inquiry as a result, but not be able to respond to even a limited extent with a single voice. It would be an efficient development to allow such companies, following a discussion with the OFT before the making of the reference, or with the reference secretary in the early

<sup>23</sup> 'Despite all the informed comments in the consumer press, and in the last few years there has been volumes written about [it] their research said that ... 34% of the population knew it for Thomson and 16% for us? It does not say much for advertising really does it? No. It was a complete and utter irrelevance for the consumer' (int. DB[2]).

<sup>24</sup> For complex monopoly generally see Brent (1993).



stages, to be able to make joint representations without prejudice to their individual positions.

Of particular concern to Airtours was the process by which the reference was made:

‘What is the criteria [*sic*] by which officials can determine that an industry should be put to such wasteful expense of time and energy? Because it seems to be a fairly maverick procedure ... that process needs to be looked at. An inquiry into an industry by people who have no experience of it by definition is going to require the information and the kitchen sink basically. There has to be a much more rigorous test applied as to where they can go in and have this inquiry. Because we know there was precious few consumer complaints. There weren’t consumers out there going “I can’t find a cheap holiday”’ (int. DB[1]).

It is hard to justify the involvement in an inquiry of a company that has at the outset been prepared to offer undertakings that are likely to match the eventual recommendations of the final inquiry. The position in this case is that in the Spring of 1998 Airtours was negotiating undertakings that fell some way short of those it would have accepted in the Autumn of 1996.<sup>25</sup> These are likely to be both less effective, and have been purchased at a considerable cost to Airtours, which has improved its reputation in the industry as a result of its approach to the investigation.

There is little evidence that the inquiry will have appreciable effects on the travel industry. The pattern of acquisitions and consolidations continued during the course of the investigation and is expected to continue. AITO believes that it has benefited from the process as a result of the publicity it has attracted. Whether this can be regarded as an efficient application of competition law is doubtful, and the conduct of the organisation comes close to that discussed by Baumol and Ordover (1985).<sup>26</sup> None of the three parties who have participated in this work believe that the position will have altered significantly for consumers.

It is clear from an analysis of all three investigations considered in this study that constant factors apply across all of them, and this conclusion is supported by the evidence presented from a wider range of sources in the following chapter. As with the previous chapters it is clear that third parties have to suffer a great inequality of arms; that there is resistance to the demands imposed by the extensive questionnaires, with concerns raised that in the final analysis the ‘wrapping’ is more important than the factual answers; and concerns about the inefficiency of the bi-partite, and in this case tri-partite, split in the operation of the regime.

#### *Endnote*

**DTI Press Release P/97/858 19 December 1997**

#### **GOOD NEWS FOR HOLIDAY MAKERS AS MARGARET BECKETT ACTS ON MMC REPORT ON THE TRAVEL TRADE**

Margaret Beckett, President of the Board of Trade and Secretary of State for Trade and Industry, today published the Monopolies and Mergers Commission (MMC) report on the supply of tour

<sup>25</sup> Thus during the negotiation process Airtours told the author that ‘What we were prepared to give them at the time, I would argue, is significantly greater than what we are likely to have to give at the end of this consultation process’ (int. DB[2]).

<sup>26</sup> See Chapter 3.



operators' services and travel agents' services in relation to foreign package holidays and announced her proposals for action.

Mrs Beckett said:

"The MMC have reported that the foreign package holiday market is broadly competitive and serves the customer well, but that three practices in the travel trade operate against the public interest. I am announcing my proposals to stop these practices, which are: the offer of discounts conditional on the purchase of travel insurance; the use by tour operators of "most favoured customer" clauses in their agreements with travel agents; and the failure of vertically integrated travel groups to make clear the ownership links between their tour operator and travel agency businesses. Altering these practices should result in consumers paying lower prices and obtaining better value for money.

"The MMC found that the tying by travel agents of the availability of discounted holidays to the purchase of travel insurance enables travel agents to inflate the advertised discount on foreign package holidays by reason of the sometimes large margins made on the sale of insurance. Consumers are misled by the discounted offer into thinking they are receiving a greater discount on the holiday they are purchasing than in fact they are; therefore, they shop around less and obtain less value for money than they otherwise would. The MMC recommended, and the Director General of Fair Trading in his advice to me agreed, that this practice should be prohibited for both travel agents and tour operators. However, the MMC recognised that the practice occurs in only a small minority of the sales of foreign package holidays by tour operators. I have therefore decided to prohibit this practice in relation to travel agents, and also in relation to companies in the same group as the travel agent in order to prevent displacement of this activity from travel agents to tour operators in vertically integrated travel groups.

"A "most favoured customer" clause is an agreement between a tour operator and a travel agent which requires the travel agent to offer as big a discount on that tour operator's foreign package holidays as it offers on any other tour operator's holidays. The MMC have found that this leads to some travel agents not offering discounts which they would otherwise be prepared to offer, resulting in higher prices for consumers. I propose to accept the MMC's recommendation, and the Director General's advice, to prohibit the use of these clauses.

"I propose to make an Order under the Fair Trading Act 1973 to prohibit these two practices. However, before making the Order I intend to consult on my proposed remedies, to allow interested parties the opportunity to comment. A notice to that effect will be published, inviting written representations before 11 February 1998; a copy is attached.

"The third practice is the failure of vertically integrated travel companies to take sufficient steps to ensure that consumers are made aware of the ownership links between their tour operator and travel agency businesses. The MMC have found that this lack of transparency means that consumers shop around less for foreign package holidays, with the result that there is less competitive pressure on travel agents. Consumers are therefore likely to get less value for money. The MMC, and the Director General, have therefore recommended a range of measures designed to ensure that consumers are aware of ownership links between tour operators and travel agents.

"To address the lack of transparency of ownership links, I am asking the Director General of Fair Trading to seek suitable undertakings from Thomson Travel Group Limited (including Thomson Tour Operations Limited and Lunn Poly Limited), Airtours plc (including Going Places Leisure Travel Limited), Thomas Cook Group Limited (including Sunworld Limited), and Carlson Leisure Group (UK) Limited (including Inspirations East Limited and M T G (UK) Limited trading as A T Mays and Worldchoice) in relation to the presentation of ownership links on the outside and inside of their retail premises and on the printed brochures and stationery of their travel agency businesses."

Notes to Editors



1. Copies of the MMC report 'Foreign Package Holidays: A report on the supply of tour operators' services and travel agents' services in relation to foreign package holidays', CM 3813 (£23.70) are available from the Stationery Office. Press copies are available from the DTI Press Office.

2. The MMC report follows two references by the Director General of Fair Trading on 7 November 1996 under sections 47(1), 49(1) and 50(1) of the Fair Trading Act 1973. The MMC were asked to investigate the supply in the UK of travel agents' services in relation to foreign package holidays and the supply in the UK of tour operators' services in relation to foreign package holidays. The MMC delivered their report to the Secretary of State on 6 November 1997.

#### **MONOPOLIES AND MERGERS REPORT ON THE SUPPLY IN THE UNITED KINGDOM OF TOUR OPERATORS' SERVICES AND TRAVEL AGENTS' SERVICES IN RELATION TO FOREIGN PACKAGE HOLIDAYS**

This notice concerns an order the Secretary of State for Trade and Industry intends to make in relation to the supply in the United Kingdom of tour operators' services and travel agents' services in relation to foreign package holidays. Before she makes the Order she is required, under section 91(2) of the Fair Trading Act 1973 ("the Act"), to publish a notice so that anyone with an interest in the matter may make representations to her.

1 The Monopolies and Mergers Commission's report: "Foreign Package Holidays, a report on the supply in the United Kingdom of tour operators' services and travel agents' services in relation to foreign package holidays ("the report") was presented to Parliament by the Secretary of State for Trade and Industry by command of Her Majesty and published in Cm. 3813. Copies of the report may be obtained from The Stationery Office.

2 The MMC found two complex monopoly situations which operate against the public interest. The first complex monopoly situation exists in relation to the supply of tour operators' services and involves the practice of agreeing "most favoured customer clauses" with travel agents. The second complex monopoly situation exists in relation to the supply of travel agents' services and involves, among other things, making a discount on a holiday conditional on purchase of travel insurance.

3 The Secretary of State intends to make an Order under sections 56(2) and 90(2) and (4) of, and paragraphs 1, 2, 5 and 6 of Schedule 8 to the Act for the purpose of preventing or remedying the adverse effects specified in the report.

#### **The nature of the proposed provisions**

4 The Order will declare it unlawful for a tour operator and a travel agent to make or carry out an agreement having the effect of restricting the freedom of the travel agent to discount the holidays of other tour operators at higher levels than the travel agent discounts the holidays of the tour operator ("most favoured customer clauses").

5 The Order will require tour operators and travel agents who are parties to most favoured customer clauses to terminate them within such period as the Order specifies.

6 The Order will declare it unlawful for a travel agent or a member of the travel agent's group to require a customer to purchase travel insurance as a condition of supplying a discounted foreign package holiday.

7 The Order will declare it unlawful for a travel agent or a member of the travel agent's group to discriminate in the price charged for a foreign package holiday in favour of a customer purchasing travel insurance or against a customer not purchasing travel insurance.

8 A number of terms will be defined in the Order, in particular:



- (a) foreign package holiday,
- (b) discount,
- (c) group,
- (d) organiser,
- (e) package,
- (f) retailer,
- (g) travel agents' services,
- (h) tour operators' services

#### Representations

9 If your interests are likely to be affected by the Order, and you wish to make representations about it then you should do so in writing to Mr John Lambert, Consumer Affairs and Competition Policy Directorate 3b, Department of Trade and Industry, Room 6.N.11, 1 Victoria Street, London SW1H 0ET. Your letter must say what your interest in the matter is and the grounds on which you wish to make representations. Your letter must be received before 11 February 1998.



# Chapter eight — The Repeat Experiences of Professional Advisers and Consumer Groups

## INTRODUCTION

The interviews on which this chapter are based were held primarily in order to support or test assertions made in the course of the specific case studies, and also to attempt a closer estimate of the costs of professional advice. Inevitably however other issues, reflecting the concerns of those interviewed, were raised.<sup>1</sup> As far as possible the comments made have been cross-referenced, and developed into consistent themes. Occasionally, however, it has not been possible to do this, and where interesting or noteworthy comments have been made these have still been used. Interviews are quoted from at some length; in order to preserve guarantees of confidentiality it has not been possible to attach the complete texts of the interviews as an appendix to the work. The approach taken in interviewing, and in setting out questionnaires, is discussed in Chapter 2 – methodology. Three groups have been interviewed: lawyers; economic consultants; and consumer bodies. While the latter group is not directly involved as either the subject of inquiries, or by way of giving advice to those subjects it does have a repeating involvement in making arguments both in individual cases on behalf of consumers, and in pressing for reform more generally.

---

<sup>1</sup> The same referencing system is used here as elsewhere in this work for interviews; however, anonymity is required, although the author retains copies of the interview transcripts. For the sake of ease of reference the following is the complete list of interviews cited in this chapter:

Lawyers

- RL1 Anon
- RL2 Anon, Anon
- RL3 Anon
- RL4 Anon, Anon, Anon
- RL5 Anon
- RL6 Anon
- RL7 Anon
- RL8 Anon
- RL9 Anon
- RL10 Anon

Economists

- RE1 Anon
- RE2 Anon
- RE3 Anon

Consumer bodies

- RC1 Jill Johnstone (Head of Policy), National Consumer Council
- RC2 (PE), (MP) Phil Evans (Head of Competition Policy), Mark Purdy, Consumers Association



## PROFESSIONAL INVOLVEMENT IN COMPETITION INQUIRIES

### *Lawyers*

Typically it is lawyers who manage competition investigations (even if, as one respondent noted, 'I quite like doing MMC references because not that much law is involved', (int. RL4, TU), although one respondent was a firm believer in 'letting the [in-house] legal department have its say in how it wants to manage the process' (int. RL7), but the relationship with the client will in any event be a close one: 'lawyers cannot run, or cannot defend a complaint or press a complaint independently of a client ... the most important thing is credibility and credibility comes largely from the client, so you have got to establish a team, both on the legal side and on the client side' (int. RL2). There may be a minority of cases (as in Airtours' approach to the travel inquiry, Chapter 7 above) where the company co-ordinates the response and controls the approach to the investigation. Thus one experienced respondent has 'been involved in references where the client has gone out and got a project manager to do it because it is such a huge exercise' (int. RL4); and another has taken a case 'where the client has decided to do the work, and simply wanted to retain the lawyer to bounce ideas off him, and to have a final look at the submissions prepared by the client' (int. RL3). These cases are, as both respondents noted, exceptions to the general trend, and it remains the case that 'most clients would leave the lawyers to take a lead' (int. RL3) and where there is not an experienced in-house legal department the lawyer 'would almost invariably, automatically be the main point of contact' (int. RL7). Where the company is subject to on-going regulation (via, e.g., OFTEL, or the ITC) there will be an existing relationship between a law firm and a company, and it would be expected that 'letters would come from the OFT and ... regular clients would copy us on them at the very least' (int. RL5). Elsewhere, following the onset of the investigation, 'clients will get a whole host of letters from different people offering their services' (int. RL1) and the company may invite bids from interested law firms (i.e., hold a 'beauty parade').

Clients may approach lawyers at different stages of the process, either following initial interest shown by the OFT, or following the formal referral, and while 'neither is particularly typical' (int. RL1), it appears to be more common for the lawyer to become involved at an early stage, so that 'by the time you get to the MMC you have probably had six months of talking to the OFT' (int. RL2). Thus one respondent was brought in at the OFT stage 'in all the monopolies investigations [he has] been involved in' (int. RL3), and another would expect to be involved early on in any case 'where it looks as if, other things being equal, it would go to the MMC' (int. RL5). The changes in the law effected by the Deregulation and Contracting Out Act 1994, which gave the OFT greater flexibility to seek undertakings from the parties under investigation have also had the effect of increasing the involvement of lawyers at that stage of the proceedings.

The diversity of approaches may be shown by the experience one respondent had in relation to the electrical goods inquiries; at one firm he was involved with the client came 'after the reference had been made', at another when 'they had to respond to the OFT's questions and in the knowledge that a reference would be likely' (int. RL6).

Lawyers will typically have more experience dealing with the Fair Trading Act than with the Competition Act, which is to be expected given (i) the small number of cases brought under the Competition Act, and (ii) the greater number of parties involved in FTA monopoly inquiries. One highly experienced respondent for example at the time of the interview had handled 'about 25 FTA inquiries but only 1 s 2(1) Competition Act inquiry' (int. RL5). Although many Competition Act inquiries are disposed of at the OFT with a reference being avoided many firms appear not to rely on outside lawyers at such an early stage of the proceedings. Where lawyers are involved



at this stage the workload is unlikely to be significant, perhaps involving only a single explanatory letter.

#### Before the OFT

The OFT and the MMC approach the same broad matter from fundamentally different perspectives:

‘the MMC questionnaire starts with Adam and Eve and then moves forward ... the OFT in contrast tends to be starting its investigation from the complaint and naturally asks a different range of questions. It is much more focused on that situation then it broadens out, where the MMC inquiry starts in a relatively standard way’ (int. RL7).

This narrow focus appears to mean that lawyers are able to present arguments addressed to specific concerns, and will expend some time and effort in an attempt to resolve matters at the OFT stage. All lawyers questioned believe that there are clear benefits to their involvement before the OFT, primarily because a well-presented case may avert an otherwise likely MMC reference and most are in agreement that it ‘definitely is worth making the effort to avoid the reference’ (int. RL6). As one respondent noted, ‘the OFT receives hundreds<sup>2</sup> ... of complaints [and] the percentages mean that you have a very high chance of getting something stopped after just a couple of exchanges’ (int. RL7). Thus one respondent who has handled around 20 inquiries suggested that:

‘if effort can be expended at the OFT stage to convince them that in fact their concerns are unwarranted that is obviously time well-spent, and there is no magic, no difference from what one does at the MMC stage, except the procedure is much less formal. ... it is tempting for some companies to deal with the OFT without advisors at that stage sometimes, then they get referred to the MMC and find that they are in the middle of a very formal procedure and that if they had actually spent a bit more time and effort at the early stage they might have been able to avoid the formal stage. ... [clients] do not lightly see themselves going down that road. That is why our advice is always that it is worth spending extra time and effort at the OFT stage to seek to convince the Director General that this is not an overriding concern and that no investigation is necessary’ (int. RL2).

This view was strongly supported by a respondent who ‘recommend that the client throw a lot of resource into heading the thing off at that stage’ (int. RL8), although the same respondent later agreed that far less material would be given to the OFT than to the MMC should the matter proceed, and that ‘there is an advantage in being it focused and punchy ... keeping it simple and getting the argument right is the trick at the OFT stage’. Further, companies may forget that the process of dealing with the OFT ‘is not a commercial negotiation. They can actually make the decision on their own if they want to’ (int. RL2). Other benefits of legal involvement at the early stage are that if the matter is referred on to the MMC the issue may be clearer and better handled by the company’s team – one lawyer, for instance, believes that a much better response can be made to the MMC questionnaire, because ‘if you are pretty well ready to deal with those detailed questions you can then look at the whole case, the kind of issues they are raising and start to put something more serious together’ (int. RL5) – or that early involvement may prevent the client getting ‘off on completely the wrong foot’ (int. RL6).

<sup>2</sup> In 1996 the OFT actually received 1,396 letters of concern in relation to anti-competitive conduct (DTI, 1997b, para 6.7).



Several respondents raised concerns about the 'politics' of the OFT, and the lack of consistency of approach in the long term (e.g., int. RL1; RL3 – 'one also has to accept that this is to a large degree a political process, particularly with the OFT ... and that is why I don't think there can be any precedent value with OFT [reports]'; RL4), and one noted that a key difference between dealing with the OFT and the MMC was that 'with the OFT one is almost more playing to the individual, trying to work out how *they* are seeing the case and what the best arguments to put to them are to convince them that it should not be taken further' (int. RL7). Generally satisfaction was expressed with the organisation. Thus one respondent was of the view that:

'OFT inquiries are quite manageable. They are conducted in a reasonable way, the time limits that are imposed on the company are reasonable, the OFT does not behave in an unreasonable manner ... I am actually quite happy with the way the OFT conducts many of the Competition Act inquiries ... the standard of review, in my experience, has been pretty good' (int. RL3).

This view found support from a respondent who, while not having occasion to persuade the OFT not to make a reference, believed that the organisation is 'open and seek to understand' the situation. Problems, in this respondent's view, lay not in any entrenched attitude within the OFT but rather in the differing perceptions of the regulators and the commercial world. The 'dialogue of the deaf' he felt, occurred in situations where:

'a client knows for example what his market is as he competes in it. ... He can't prove it but he knows it because he does this every day. The competition authority, whichever comes at it from an academic background as an economist with a bunch of statistics. ... They would be willing to listen to some strong evidence in academic terms but are faced with often nothing but increasingly strong language and are quite deaf to what is being said. The [client] on the other hand is increasingly frustrated by the attitude of people who he thinks do not understand the market' (int. RL9).

Even another respondent who was concerned about the fact that 'the OFT inquiry tends to be rather long and drawn out if one does not put a stop to it after about two letters each way' (int. RL7) would prefer the OFT to continue with its complaint focused approach as an alternative to the broader focus of MMC inquiries.

## Before the MMC

### THE QUESTIONNAIRE

The first stage of the process before the MMC is the issuing of a factual questionnaire, often criticised for lack of focus (thus one respondent: 'the amount of totally useless stuff that all respondents have to come up with is huge in proportion to what is actually needed' (int. RL8)), which companies are required to complete, although in some cases there may be discussions prior to this, and the company will have the chance first to comment on a draft questionnaire. 'Quite a lot of work' may even be expended simply 'going through [the draft] and working out what you can and what you can't do' (int. RL1), but the usefulness of this process is widely accepted, primarily because the opportunity for people 'to say whether they can actually supply that information or if they can supply it in that format ... can often save a great deal of time and expense' (int. RL1). Further, comments at this early stage may, in the opinion of one respondent 'actually persuade [the MMC] as to what the scope of the investigation should be' (int. RL4). However, it is clear that respondents would, in the words of one, 'like a greater opportunity to discuss in advance what [the MMC] need as it is not always possible to answer properly all the questions they ask without devoting a considerable resource to that' (int. RL9). Another felt that



generally the MMC 'are not responsive to suggestions that maybe they could cut down on what they need' although the respondent was pleased that 'more recently they have been more responsive to ideas as to how your company can most quickly give the data' (int. RL10).

Generally the questionnaire, which typically will contain 'a list of perhaps 100 questions, a number of which will be in significant parts and will involve analysis [of figures over a number of years]' (int. RL4, HS), is considered to be both an important and burdensome part of the process. 'The time spent compiling and gathering the information can be quite considerable' (int. RL1), perhaps requiring 'up to six weeks of vital resources or management involvement' (int. RL4, HS), although different approaches may be taken in answering the questions. In some cases the legal team will prepare all the answers on the basis of data provided by the company; more typically the company will deal with the factual responses, and the lawyer may 'look at the whole case, the kind of issues they are raising, and start to put something more serious together' often in the form of 'an introduction, or a separate submission or a statement of the case' (int. RL5). An experienced respondent therefore commented that 'the data gathering is largely a matter for the company to organise ... but we would not expect typically to be doing more than commenting on whether we thought they had got it right in terms of presentation' (int. RL8).

To a significant extent it appears that the experience of the companies and the extent to which their activities are disrupted will depend on the extent to which the company operates in a regulated environment or has been exposed to competition investigations previously. This theme arose throughout the interviews, and the following comment is typical:

'You get a heavily regulated company like one of the utilities, they are so used to providing their specialist regulator with this sort of material ... you get another business which is basically making widgets or providing some sort of service which is not set up to gather information in the same sort of way at all. They may be quite big but they just don't need that sort of information in that way. And therefore when they are asked for it from the MMC it is very difficult to get out' (int. RL10).

Concerns were expressed to the effect that in answering all questions with equal weight and effort 'to at that stage a very ignorant body in terms of the industry then you can take your eye off the ball of what the client's case really is' (int. RL5). It was further suggested that, 'depend[ing] on where you are in the pecking order and how hard you get hit' (int. RL4) not all companies need respond to the questionnaire with the same effort, and that to an extent it is possible to free-ride on the returns of other companies. (This is consistent with the experience of Thomas Cook noted in Chapter 7.) In the electrical goods inquiry the questionnaire consisted of 103 questions, some of which were themselves broken down into several parts, and

'a lot of companies took the view that there were not going to waste money and resources answering [these] in detail ... and just put in the minimum response. Other companies decided, because they were so centrally involved, that it was well worth getting all the evidence in front of the MMC so as to avoid the MMC jumping to conclusions, or to the wrong conclusions' (int. RL6).

Smaller companies who consider themselves to be involved in the periphery of the investigation may be able consciously to free ride, and this will be particularly so where 'the whole industry [is] at one in terms of its views' (int. RL6).

It is usually at this stage that the team to manage the investigation will be put in place. High level participation is to be expected, and one respondent's view is that 'there would certainly have to be board representation on the team' along with 'sensible runners from the company' (int. RL5). The practice will vary however from company to company and will depend on in-



house expertise. Often the lead internal role is taken by the CEO, although if a company secretary has a legal or regulatory background they may assume the position (int. RL5).

#### THE VISIT

The MMC are likely to visit the premises of companies involved in investigations. This aspect of the procedure is emphasised in the MMC video 'Focusing on the Public Interest', and is part of the process of familiarisation with the industry under examination. Lawyers regard these visits as a useful procedure for the client, and do not generally involve themselves in the visit itself, although some preparation, particularly with staff who are likely to deal with the panel members is generally undertaken. One for instance, who wishes to remain anonymous admitted that 'we usually rehearse clients very carefully, and don't turn up to the visit itself, and I guess the MMC think that is what we do, but I don't know'. The questions that the MMC panel members are likely to ask on a visit 'are things that the company should feel free to comment on themselves' (int. RL5).

#### THE HEARING

Following the responses to the questionnaires, and any supplementary questions asked to clarify points raised in the questionnaires or in the visits the MMC may hold factual hearings, generally regarded as 'valuable' (int. RL6), at which the main parties are questioned on various aspects by the panel members. These have been described by one respondent as having changed in nature over recent years, so that they are now 'focused and quite pointed, quite focused, quite challenging', compared to the position a few years ago where they were 'often a very genteel procedure' (int. RL1).

The lawyer will in almost all cases accompany the company officers to the hearings, which are 'quite a long session often asking factual questions ... going through the factual questionnaire for more information and also going through the issues and trying to get firm information out of that' (int. RL1). Some companies will be represented by counsel, although this is a practice that is now much rarer than 15 years ago when counsel would have been involved in many cases ('people hire counsel much less frequently these days. We haven't hired counsel for an MMC inquiry for a very long time, and years ago when I first started there was a natural reaction to go and get counsel' (int. RL2)). This appears to be a general trend and is the result of 'the way the profession has developed and introduced its specialisms [so] there is perhaps less need to involve a barrister once one has developed the skills oneself' (int. RL9). Prior to the hearings the MMC will prepare and distribute a list of issues that are to be considered, and the lawyer is then likely to prepare dummy hearings with the company personnel who will be addressing the MMC's questions. However, very little time is available for this, and long rehearsals are generally impossible.

The MMC in all cases will hold public interest hearings, at which the core issues considered by the inquiry will be addressed. The 'public interest submission' prepared by the company is one of the more important documents, and is likely to occupy a large part of the lawyer's time. Several attempts may be necessary for the legal team to draft a document with which the company is happy, and on the basis of which verbal answers may be given at the public interest hearing. One lawyer will 'bounce the ideas around with a client from anything from a day to two or three days', and believes that this 'is a very significant and also the most complicated phase' in the proceedings (int. RL5).



Several respondents expressed concern, however, as to the difficulty of responding effectively to the MMC questions at this stage, and in preparing strong submissions, as the MMC is usually reluctant to give any indication of the likely approaches that it is considering. One respondent therefore argued that:

'The thing that creates work and also creates uncertainty is that [the MMC] take their "we haven't reached any conclusion of course" to ludicrous degrees sometimes. It would be much better if they were going to focus and say "our provisional conclusion is X. What are your views?" ... The effort to be seen not to have prejudged it is taken to such a point that you do not necessarily get a focus on what it is you are trying to address on a particular issue ... it is a real weakness in this inquisitorial system that there is not sufficient feedback about what the counter arguments are so you are not able to necessarily deal with matters effectively' (int. RL10).

#### The quality of analysis, and the outcome of the procedure

All respondents were asked their views as to the general efficacy of the OFT/MMC approach, and the quality of the analysis in the recommendations. In part this aspect of questioning was designed to test whether respondents felt that an active and constructive participation in the process of investigation by the companies affected could impact on the conclusion reached. Although not prompted to several made comparisons with the reasoning underlying decisions taken in the context of EC Competition law by DGIV.

The majority of lawyers strongly believe that a well-presented case, particularly when advanced by one of the leading parties to an inquiry, can be rewarded. One respondent, for example, is of the view that 'what we have done has affected the outcome on the cases we have acted on ... I think that the MMC, of the cases that I have been involved in, have been listening reasonably carefully' (int. RL5). There are situations in which all lawyers were able to point to what they believed to be failings in particular reports, whether in the identification of the market, the assessment of market share or market power, but the generally positive feelings about the work done by both the OFT and the MMC is reflected in a range of comments: 'I think the MMC reports are regarded generally as pretty thorough ... they are of deeper quality' (int. RL1); 'The end product is almost always very impressive' (int. RL6); 'I think on the whole it is value for money' (int. RL5); 'I have found ... the MMC great to do business with. They are well organised' (int. RL4, EGB); 'it is certainly thorough ... as a general proposition they are very thorough market analyses' (int. RL2); 'if one compares the analysis done by the MMC with that done by the EC Commission ... the MMC comes out of it extremely favourably' (int. RL3); 'generally I think they are really trying to get to grips with what you are saying about the industry even if it does not fall into the typical pattern they have seen before' (int. RL7); and 'most clients feel reports are well done even if they object to the conclusions' (int. RL9). Greater satisfaction was expressed by several respondents with the work of the MMC than with the work of the OFT, and one, who wishes to remain anonymous, commented that 'the feeling is among clients that you have a much more comprehensive, more equitable and more informed treatment at the MMC' and that after the OFT clients may 'feel that the MMC is almost welcome at the end of the day'; another commented that 'a wider range of expertise and a greater depth of thought goes in at the MMC level' (int. RL7).

However, as one respondent noted 'the question is whether in order to resolve whatever anti-competitive effects there are it is necessary to have such a massive broad reaching inquiry and such a detailed report. I think the answer is probably no' (int. RL6).



## PREVIOUS REPORTS AS INDICATORS OF FUTURE FINDINGS

Lawyers were asked whether they were able to rely on previous MMC actions and reports in advising clients faced with investigations into their industry. The general view was that while past experience did to a limited extent acting 'as a precedent system' (int. RL4) reports were of limited assistance in anticipating MMC conclusions or conduct, and that the best that could be hoped 'is some form of guidance' (int. RL1). A respondent involved in two inquiries at the time of the interview, for example, was of the view that it is not 'possible to use old MMC reports in different sectors and different markets as an accurate guide to what may happen another time around ... there are different products, but there are also inconsistencies in them as well' (int. RL6).

## The attitude of clients to the process, and other procedural issues

All respondents were asked to comment on the attitude of their clients to the procedure, and whether there were any aspects of the procedure that they felt to be unduly burdensome, or aspects that they felt to be effective. The author recognises that this is a very open question, and responses were somewhat disparate, although some consistent themes emerge.

## PROCEDURAL ISSUES

The approach of the MMC to deadlines, and the straightjacket imposed by these somewhat artificial constraints was referred to by several respondents, the concern being 'a tendency to expedite the inquiry at what you might notionally call the easy parts and that at times produces a lack of understanding' (int. RL5), or that the MMC 'are really very reluctant to run over the times, and you don't like asking for extensions' (int. RL4). Concerns were also raised about the speed with which inquiries progressed at the outset, the feeling being that many questions and issues could be avoided by slightly greater research and a level of informal contact at the outset. The single largest concern related to the repetition of effort required under the regime, one of 'the most frustrating aspects' being that 'having dealt with the OFT and given them the information the MMC then spends six months or more getting up to speed' (int. RL6). One respondent made the point that this duplication in the process was unique so that 'there is nothing to compare it to', and lead inevitably to the position where 'you can see why people dread getting involved with the MMC because they have already had to deal with the OFT inquiry before even getting there' (int. RL4).

## CLIENTS' VIEWS

The question was asked whether clients were more likely to be threatened by the procedure itself or by the fear of possible changes following the report, following comments made by company officials which suggested that the procedure itself was the penalty. Naturally the responses will vary depending on whether a company is a scale or complex monopolist, and the conduct about which concerns are being raised, and the size and management structure of the company will be important in determining the impact on the company of the investigation. A tightly managed company with few resources and little slack will be hit disproportionately harder than a company with a more flexible management structure (raised in int. RL2). Further many companies are likely to have very limited expertise in or knowledge of, the UK competition law system, tending to be 'much more aware of European competition law' (int. RL1). Thus one respondent with recent experience of a major investigation, suggested that 'those people who were not in the UK were absolutely clueless, about everything, and in even those in the UK were not particularly



well informed. When they became better acquainted with what was going on they were astounded by the volume and daunting nature of the procedure' (int. RL6). The position is exacerbated by the complex monopoly provisions (see the Annex, below), one effect of which is that some companies 'might inadvertently get thrown into a complex monopoly where they might not realise that they have been brought into UK competition law' (int. RL4).

While 'some companies feel much more threatened than others' some 'go into it and say this is a bloody nuisance, it shouldn't have happened, it's a waste of time, we have got nothing to worry about and we will be fine at the end of the day' (int. RL5), but the general attitude is likely to be at the least that the announcement of a reference gives company officers 'a kind of sinking feeling' (int. RL4).

Generally it is to be expected that the views of companies subject to the system will be negative, and comments such as 'utter exasperation' (int. RL6) were frequently made by respondents. One respondent was of the view that 'clients are increasingly mindful of what competition law can do', and, above all, feared 'change ... and any tampering with their business' (int. RL4). However, this fear might be tempered by the fact that 'particularly with an FTA investigation, that it is an industry investigation and you tend to find that the industry doesn't much mind going down in flames with everybody else' (int. RL1).

### *The position of complainants*

The lawyers interviewed were asked the extent to which they acted for complainants, and how they would advise complainants under the regime.

Clearly UK law is utilised by parties seeking redress, although with at best uncertain prospect of success, and the complainant taking this route will be 'playing a very long game' (int. RL1). The position facing a complainant determined to pursue a matter has been well described by one respondent who has acted for several:

'Making a complaint to the OFT and following it through to making a complex monopoly reference will take months and months in my experience, because the respondents stall and take far longer than they need to put their own representations in, then depending on the identity of the Director General the recommendation goes up and down and moves around and then the MMC itself is going to take another nine or twelve months, and then even if it comes out against the practice the DTI is going to take a while to talk about proposed remedies and those have to take effect. It is quite difficult to persuade a client that they can come out of the process waving a result that they can use for two years or so and that is too long in relation to what is an immediate problem' (int. RL8).

However, one lawyer with significant experience in this area explained that his work involved 'increasingly giving third party representations in an ongoing investigation' and that 'the ultimate goal in certain cases ... is actually encouraging the OFT along the way to making an MMC reference' (int. RL4). It would appear that the demands of such work are much less than when acting for a party to the investigation, and it appears to be the case that the experience of AITO (see above, Chapter 7) is reflected elsewhere. Thus the lawyer quoted at length at the beginning of this section, although expressing pessimism as to the timescale involved recognised also that burdens imposed on complainants were far less than on the alleged infringer, and described his role as being 'simply to make sure that the message that the client wants to get over is got over, rather than trying to undertake a whole economic analysis of the situation as the monopolist



themselves will be doing that' (int. RL8). And a respondent acting for a complainant in the electrical goods investigation (MMC, 1997a, 1997b) similarly noted that:

'... it is a much easier process undoubtedly. It simply involves us supplying the OFT with a sufficient amount of information to get them interested, and once it is referred to the MMC there is much less of a burden on the complainants. In fact to a large extent the complainant does not even have to worry about providing information to the MMC' (int. RL3).

The approach then when dealing with pressing a matter on behalf of a complainant is likely to be totally different than when representing a party to an investigation:

'if you are coming from a complainant or cod-complainant you are very much in the position where you are pro-active, you are trying to influence the MMC with what you are saying very actively towards a particular remedy, a particular finding, trying to point them that way. If, on the other hand, you are acting for the defendant it may be a rather amorphous situation in which your client's position is nothing like so clear' (int. RL10).

Concerns about the possibility of commercial recriminations (which tended to support the fears expressed by AITO) were raised by several respondents, and less directly concern was expressed that more active involvement in the process 'could have jeopardised their client relationships, which they had built up over a number of years' (int. RL3). Similar concerns were raised by another respondent (int. RL 4) who has been involved in a number of cases where the aim has been to persuade the OFT to make a reference, and who remarked that 'confidentiality is really tight because you do not want your main customers or competitors ... knowing that you have banged on those doors'. Another was also concerned about 'issues of confidentiality ... a client was asked by the OFT to attend a hearing and refused to do so, because it could not get guarantees ... that its views would be kept confidential. The evidence it was being asked to submit would have badly prejudiced its customer relationships' (int. RL3). From the other side a lawyer who has not acted for, and would be reluctant to act for, complainants is of the opinion that:

'where a complainant is playing a major role in a case ... the fact that one does not have the ability to confront the complainant head on is a major problem. You don't have the ability to really come to grips and show that the complaint may not be properly motivated' (int. RL7).

This view was echoed by others. A respondent who has advised complainants on several occasions was still concerned about the 'shadow-boxing aspect of the procedure' although he qualified this concern by admitting that 'there are also aspects to that which are valuable' (int. RL9). The usefulness (or perhaps uselessness) of UK law to complainants has been commented on on many occasions and was a source of some concern to respondents. The following comment, made in response to the question as to how the plaintiff's armoury would be ranked in order of efficacy, is typical of the attitude of practising lawyers:

'The Competition Act and monopoly investigations come down the bottom. We would look at article 85, or article 86 and then article 85. We would not rule out the national courts, but we would probably end up before the Commission' (int. RL6).

Another was of the view that practice was changing, with an increasing emphasis on direct actions based on EC law rather than recourse being sought by way of the EC Commission (int. RL3). The following approach is typical of the sample:

'When I am advising a complainant I would typically turn to London under the



present system only when Brussels for whatever reason is disinclined to act for whatever reason, either because there was no jurisdiction or because it had jurisdiction but chose not to exercise it' (int. RL9).

Several respondents pointed to adverse publicity as a cost to be borne by those subject to references, *viz*: 'the penalties are publicity – bad publicity for the companies' (int. RL1). However, this was not rated as a significant concern by those interviewed about the specific references forming the subject matter of Chapters 5–7, and it is not easy to reconcile this claim with the low level of public submissions made to either the OFT or the MMC. As has been shown a large number of submissions made are either solicited by the MMC, or are made in response to specific trading concerns. Stigler was sceptical of the claims made for the power of publicity by early commentators on the American system, noting that: 'How and where publicity (after all a policy akin to legal blackmail) could control undesirable behaviour was never spelled out' (1982, 4).

### Lobbying

The problem of rent seeking has already been considered in Chapter 3, and it has been suggested by Morrison et al (1996) that costs associated with rent seeking in the anti-competitive process (defined by the authors as a vigorous defence of a company's position going beyond that necessary to participate with the procedural requirements of the investigation) should be discounted when attempting to quantify the costs of the procedure. The issue of lobbying in particular has been mentioned by several respondents. It is reasonable to assume that companies will incur expenditure in the lobbying process if they believe that the OFT in particular, but also the MMC, can be swayed by such a mechanism and Ernst & Young (1993, 6) quote a respondent in their survey as stating that: '[o]nce [the OFT] start proceedings there seems to be no way of stopping it'. The amendments of the Deregulation and Contracting Out Act 1994, s 7, however, post-date that work, and there may be a strong incentive on firms to use all available mechanisms to persuade the DGFT to accept undertakings in lieu of a MMC reference (see the Annex, below).<sup>3</sup> One respondent lawyer suggested that the attitude of medium-sized companies was to 'have as their first instinct, "oh it is a government department, we need to get our lobbyists involved"' (int. RL3). There are conflicting views from the respondents and amongst those questioned in relation to Chapters 5–7.

There is a general consensus held by the professional advisors interviewed in relation to this chapter that lobbying is generally not likely to be successful in relation to Competition Act or monopoly inquiries, although it may have a role to play in merger cases. By one definition (int. RL2) lobbying could include the presentation of a case by the law firm or company involved before any of the agencies. Here lobbying is taken to be the employment of an outside agency for the express purpose of influencing decisions without doing so through the normal investigative channels.

Where lobbyists are involved throughout the process tensions may arise between the conflicting approaches. One respondent referred to an unfortunate experience:

'I have got one client who wanted their lobbyists who they use all the time to be involved ... and I actually found them quite irritating. They didn't understand really what the MMC was doing, and that made it quite awkward with just explaining everything to another group of people. When they came to meetings they would take up some time, and yet their suggestions which you would have to listen to reasonably tolerantly were almost always completely off the wall' (int. RL5).

<sup>3</sup> As the DTI noted 'Companies are understandably keen to avoid MMC monopoly enquiries if possible' (1993, 10).



Another lawyer has 'never recommended to a client that they should engage somebody to represent them in that way' but often finds 'that clients will have got that input' (int. RL1). Where companies choose to present a thorough case to the OFT in the hope of averting a reference to the MMC (see above) this is explicitly invited by the legislation and cannot reasonably be classed as rent-seeking.

### *Economists*

Economists, who are likely to come from one of only four firms (Lexecon, NERA, and London Economics, all of which entered the market at about the same time, and a more recent addition, CASE),<sup>4</sup> may provide several services in the course of competition proceedings. Prior to the late 1980s economists were rarely involved in cases to any significant degree. One respondent explained the reasons behind his firm's move into the market:

'when you look at the way decisions are made within the agencies there are generally economists involved in the case work, and there are not really many lawyers. Lawyers in the OFT and the MMC do a very restrictive job, they just advise on the law. When you get into the advisory world, or the involvement of companies they always use the law firm to advise them through the case and the law firms take quite a prominent role in helping the company through the case. And it always seemed pretty obvious to me ... that there was an obvious need for an economist on the other side. I think events have proved that hunch to be right in that now most companies involved in any sort of serious way with the MMC would use an economist ... given that the MMC use economists a lot it was just crazy for firms not to use economists a lot' (int. RE3).

At an early stage the role of the economist is usually to discuss approaches with the client and the legal team; they may help the lawyers in drafting the submission, or more formally write an economic analysis; more substantially they may provide a full empirical analysis to support commercial or legal assertions being made. Where the economist is involved in making a substantial submission they will 'be totally reliant on the company for documents and data' (int. RE1). The companies themselves, however, are felt to be unable to present the data in the appropriate manner:

'It is the packaging that the firms can't do. At the end of the day you are very much reliant on your client for information, although you will go to outside third party resources. ... What we will do is package and analyse it, and generally the client is unable to, for no other reason than that they will have a commercial reason for entering into a commercial practice ... and if you ask the client what market they are in the way they perceive the market they are in from a commercial perspective will not actually be the same market that might be relevant for competition purposes. ... the way we will be thinking about the problem is totally different to the way [the marketing manager] might be used to' (int. RE2).

In most cases the economists will be brought into competition inquiries at the suggestion and recommendation of the lawyer retained by the client: 'the law firms certainly get the work first, typically, and then either they bring us in or the client company would bring us in' (int. RE3). There will however be some cases 'in sectors where there is a history of dealing with the competition authorities where the in-house counsel know [the economists] quite well' (int. RE2) and there the company may retain the economist independently of any legal representation

<sup>4</sup> Two academic economists, Basil Yamey of the LSE and George Yarrow of Oxford, also act as advisers to law firms in this area, but are both time and resource constrained and do not take a significant share of the market. Neither do they handle substantial submissions or deal with much empirical data.



retained, and in exceptional cases the economist may be involved first and recommend the participation of a legal team.

Whether an economist will be retained is a matter of judgment, and even lawyers who are keen on involving economists are unlikely to turn to them in every case, although one respondent was of the view that 'they will always be involved effectively' (int. RL4), and another felt that:

'at the very early stages it is often very useful to get economic input because an economist can often see where questions are leading whereas a lawyer who hasn't got an economic background may find that quite difficult' (int. RL1).

Thus one respondent would encourage clients to use economists only 'if it is a case which is going to raise complex economic issues [such as] where you are looking at service industries and the MMC is focusing more than anything else on whether they make excessive profits' (int. RL5). Another who had only recently begun to have recourse to economic advice was impressed: 'having used them recently I can understand [their popularity]. They are really very good. ... the economists can be quite inventive in coming up with ways of interpreting ... statistics' (int. RL3). The general view was perhaps best summed up by a respondent who noted that

'The MMC economists are good well trained people and I think that makes it useful to have the input of proper economists rather than one's own version of the theory, which is probably a bit watered down in the understanding' (int. RL7).

This view is supported by economists, one of whom felt that 'the client will be faced with no choice. Because the other side will have an economist and if you don't have an economic argument yourself you will be left in a difficult position' (int. RE2). The lawyer who has never turned to economists for advice or help, and who does not expect to do so in the future is very much the exception of those interviewed (int. RL6).

The role of economists has changed over the years 'because the whole market has become more used to the idea that you need economic analysis ... five years ago it was unknown for us to become involved at the OFT stage ... it is now much more common' (int. RE1).

As with lawyers economists would prefer to be involved in the early stages of competition investigations: 'our favourite sort of case is very early on when the issue arises, we get called in to think through the problem and how to tackle it and the way to take the case with the lawyers and the company' (int. RE2). The suggestion was made by the same respondent that early involvement would also likely lead to a reduction in costs:

'very often you get called in early and don't actually do that much, because we can frame it and say this is what we need to do, and we can best do it that way, and then don't actually spend that many hours on a case. Whereas the middle ground cases, two-thirds of the way along suddenly you have a big empirical problem, those cases can actually be for us the most lucrative, because you are coming in like a plumber and solving the problem, and very often for us it requires quite a large piece of analysis' (int. RE2).

There are, however, strategic considerations as to whether this involvement should become apparent to the regulators at an early stage, and there is a perception (raised by all three respondents) that if complex material is presented early on it may encourage the OFT to make a reference.

It is highly likely that if an economist is retained they will be involved in advising on the response to the factual questionnaire. Typically the consultant will paw over those questions with the client, helping the client to determine what the MMC is likely to be focusing on. For



example 'in the travel industry we would have looked into past cases, and have a very good knowledge of the literature on vertical integration which the client would not have a clue on even if they were a very big firm ... because it is a very specialist set of industrial economics that we deal with' (int. RE3). The major factor shaping the involvement of the economist is:

'we have a lot of knowledge about the framework within which the MMC will be looking at [the client's] industry, and in the typical scale monopoly inquiry firms will not have a clue ... an awful lot of what we do is fairly much a translation job, helping clients to understand how the framework of industrial economics is likely to be applied to their particular industry' (int. RE3).

#### THE RESPONSE OF THE OFT AND MMC TO ECONOMIC EVIDENCE, AND THE DIFFERING APPROACHES

Serious concerns were raised by two respondents as to the ability of the MMC and OFT to handle often complex economic arguments, and it appears that the perception and experience of economists and lawyers in relation to the satisfaction expressed with the regulators is somewhat different. This is likely to be largely the result of the different roles of the two groups of advisers: lawyers will focus on the result obtained, whereas economists, who are less concerned with acting as an advocate for the client may focus more objectively on the response to the economic arguments made.

It is also apparent that the differing levels of expertise and the differing approaches taken by the OFT and by the MMC, and indeed by different panel compositions at the stage of MMC involvement, increase the burdens involved in making effective arguments and presentations.

The function of the OFT as a 'screening process' (words used by all three respondents) was felt to inhibit the presentation of detailed economic evidence. Thus two comments are consistent in their tenor:

'Again and again there are things that we could do, and are tempted to do, but don't do because you have a voice inside you that says OK it will cost quite a lot to do this, but really are they going to evaluate it properly? Or will they just shy away because they will not be able to, and the answer frequently is just don't do it' (int. RE1).

'If you do anything technical or empirical they have a nightmare. By empirical I mean if you do numbers and tables and stuff there is no problem; but if you actually do regression analysis, or anything more technical or based on modern economics it is a nightmare for them. And that is a real difficulty because modern economics is more mathematics based. ... You know full well that there are actually very specific ways of dealing with problems, yet you know that if you go in with that there is not going to be anybody there who can understand it, and that makes it quite difficult' (int. RE2).

However, another respondent was less critical of the ability of the MMC and OFT to respond to sophisticated arguments and evidence:

'if the MMC cannot understand what you are doing then I think you have to assume it is your fault ... because you have not explained it properly ... I have never been in the situation in the UK where I have ended up saying you could win the case on its merits using this argument but they would not understand it so don't use it' (int. RE3).

Generally it was noted that 'the decision process [in America] is informed by a more sophisticated set of tools ... other things being equal they certainly have a better toolbox and one would expect their decisions to be better' (int. RE1). All three respondents noted the very different



strategies they had to use when presenting evidence to the OFT and to the MMC, and further remarked on the fact that different approaches needed to be taken at the MMC depending on whether material was being prepared for the officials, or being presented to the panels. The different constitution of panels can have unfortunate results, and ‘there is quite a lot of variety between cases. Some of them are dealt with very well and are really quite spot on ... others are five million miles away from where they should be’ (int. RE2).

COMPETITION WITH LAWYERS FOR FEES?

Respondents were asked whether they competed with lawyers for fees, and the extent to which their involvement in the process was a substitute for that of the lawyer, and the impact their involvement had on the overall fees. None felt that there was any significant degree of substitution or competition between the two groups. This may be because, as one explicitly recognised, ‘it is not in our interests to think of this as a conflict between us and the law firm, because that is where we get most of our work from’ (int. RE3). Thus one accepted that ‘in a very small way I suppose there might be some competition with lawyers for fees, but not in any significant way ... we don’t provide the same service. We specifically say that we do not provide legal services’ (int. RE1) Another agreed:

‘where there may be a bit, there may be certain pieces of economic analysis, which just need to be done, which would be done by the economist because the economist tends to be a bit more empirical, which would otherwise perhaps have been done by the lawyer, so there is an element of [competition] but it not big very often’ (int. RE2).

Professional fees and costs

Understandably there is a reluctance among firms, both of lawyers and of consultants, to discuss fee levels, and no respondent was prepared to disclose fees charged to individual clients, which are both a matter of the firm’s own competitive edge, and client confidentiality. Neither were companies that co-operated in the case studies prepared to disclose fees paid. The following ranges of figures were given in response to questions as to likely fee levels, and more detailed discussion of the issues referred to follows:

Lawyers	Estimated fee range (£) <sup>1</sup>
RL1	200,000–300,000
RL2	15,000–20,000 [small complex monopolist]; ‘several hundred thousand’ [leading scale monopolist]
RL3	100,000+
RL4	— <sup>2</sup>
RL5	not less than 150,000; 200,000–250,000 [‘bog standard’]; 500,000+ [‘very rare ... but I can still think of a couple’]
RL6	80,000 [‘but it could be a hell of a lot more’]
RL7	250,000 [‘ball park figure’]
RL8	250,000 [‘plus or minus’]
RL9	— <sup>2</sup>
RL10	100,000 [‘typically’] 250,000–500,000 [‘depending on how extravagant’]
<sup>1</sup> The question asked was ‘what typically would you expect the fees to be from a firm such as yours in competition cases’. Experience showed that respondents were reluctant to divulge exact fees that they had charged.	
<sup>2</sup> Respondent not prepared to divulge any figures	
Economic consultancies	
RE1	50,000–70,000 [‘very common’]
RE2	20,000–100,000
RE3	5,000–20,000 [‘typical case at OFT stage’] 20,000–over 100,000 [‘MMC scale monopoly’]



It is hard to derive meaningful averages from figures covering a range such as that set out here, although a figure of £250,000 would appear to be a reasonable estimate of the typical legal costs of those companies playing a significant role in an MMC inquiry.

Several respondents noted that while fees might be significant the greater burden would be borne indirectly by diversion of management time and effort. Thus one lawyer referred to meetings 'where you have got the managing director, the finance director, the sales director ... and that's a lot of very good people who are being dragged away from their role within the company' (int. RL1), and another suggested that the direct costs 'pale into insignificance in terms of management time that might be involved' (int. RL3), pointing to a similar level of internal staff involvement, and in particular 'a lot of time on the part of middle management'. Another attempted to place the professional fees likely to be charged into the overall context of the investigation:

'the big cost and aggravation of it for [name omitted] where it is their core product under threat, a hugely profitable product as a matter of public knowledge, and the prospect of some form of price control, or the capping of their profit ratios is a major, tens or hundreds of millions of pounds issue, and the legal fees in relation to that are not at all significant. The fact that the director of the [omitted] division has to spend the best part of four, five or six months of his time making sure that the angles are being covered is the major concern' (int. RL8).

Similar views were expressed by economists, one of whom referred to professional fees and then noted that 'by far the bigger cost is the diversion of company time and effort from activities. The costs of that time can be very high. Advisers' fees are not small, but in relation to the overall costs are tiny' (int. RE2). More forcefully another commented:

'Do these people not realise what it is like to run a big company, that people have no time at all? It is a desperate rush to keep the thing spinning out of control, and if the top man can manage to do that then he is a brilliant manager. To require him to take his eye off the company three or four times in an investigation, and to tie him up in a process taking months and diverting attention away from that company to me seems to be crazy' (int. RE1).

## CONSUMER GROUPS

With the exception of the various classes of professional advisers consumer bodies are the only groups that have often become involved in investigations. There are two consumer bodies which fall into this category: the National Consumer Council (NCC), a policy think tank and campaigning body whose funding is provided largely by the DTI; and the independent Consumers Association (CAs), most of whose income derives from the publication of *Which?*. Appropriate personnel from each organisation have participated in this research.

The involvement of the NCC is limited, for while it is concerned that 'the MMC is not an advocate of the consumer', it 'can't get involved in individual cases, or only to a limited extent, because [it has] not got access to all the information needed'. The NCC is regularly asked for its views by the OFT, and has presented both written and oral evidence, but does not have the resources 'to make a good case' with the single exception of the motor vehicle industry where market figures are available through the DVLC in Swansea (all quotes int. RC1).

The CAs plays a more active role in investigations, and the area of competition policy and competition cases 'as always been a major element of CAs's work', although given resource constraints it tries 'to pick those that are either of enormous relevance, as test cases, or ones



which are relatively straightforward to deal with' (int. RC2, PE). The involvement of the CAs in the travel investigation is discussed in chapter 8 above, but it has recently also been involved heavily in the electrical investigations (MMC 1997 a, MMC 1997b) which it suggests 'was mainly brought about by a *Which?* article which showed that there was very little variation in prices' (int. RC2, MP). The cost of this involvement was described as 'substantial', but qualified to reflect a different scale of expectation from industry generally:

'we think of substantial, in terms of the surveys we did would cost a couple of thousand pounds each maybe, and staff time writing them up again would be a couple of thousand pounds. Staff effort in doing the work again only into the thousands. So in terms of budgeting you are probably looking at £10,000 or £20,000' (int. RC2, PE).

The CAs does not draw upon outside expertise when formulating or presenting its arguments ('it is a resource constraint, lawyers cost money' (int. RC2, PA)).

Three major concerns were expressed by the CAs's economists: firstly that the involvement of the CAs was haphazard; secondly that the economic modelling employed lacked rigour and consistency (a view shared by the economic consultants); and thirdly that little obvious benefits flowed from either the CAs's involvement in specific cases, or more widely from the system itself. Involvement in investigations, at least at the early stage, is largely dependent upon the OFT making an approach, and it was felt that this was somewhat 'ad hoc' and depended in part on the official who was handling the case at the OFT. Concerns as to the quality of the economic analysis centred around the lack of an appropriately rigorous welfare model, which, if set up correctly would lead to 'the potential for consumer welfare to be enhanced' (int. RC2, PE), and with the fact that even if the MMC staff produced good analysis in an individual case 'when members come to vote and decide on the conclusions they don't always seem quite to follow' (int. RC2, MP). Neither respondent was able to point to a case in which they could say with confidence that they had significantly affected the outcome, although it was felt that there was value in participation this would be hard to quantify:

'any result is going to be a combination of 20 or 30 factors of which we are going to be just one, and we may be a major factor in RPM, travel trade, we may be a medium factor in airlines ... we may kick start the debate but the end result, you can trace a tortuous path to the work you did, but it would be quite arrogant to think you had that much effect' (int. RC2, PE).

More generally the CAs's chief economist summed up the CAs's view of the approach as a whole: 'the [MMC] spends all this money and does nothing in the end' (int. RC2, PE).

## CONCLUSION

The evidence collected in this Chapter supports that presented in Chapters 5–7 confirming that these are typical cases, and makes clear that there is wide consensus as to the approach to be adopted to OFT and MMC inquiries. Every party under investigation is likely to employ an independent lawyer, at a cost of approximately £200,000 in the case of a scale monopolist, or a complex monopolist at the centre of the industry. For a small complex monopolists the costs may be as low as £20,000. Larger parties are likely also to have recourse to specialist economic advice, although there are different approaches taken to this matter by lawyers, some of whom are reluctant to take advice from economists, others of whom regard such intervention as essential. It is apparent that economic evidence and arguments is increasingly important. An average fee



for these services would be around £50,000. It is thus clear that, in direct costs alone, most companies under investigation would be paying some £250,000. All advisers have noted that these costs will be outweighed by the additional burdens imposed within a company, particularly in the management time that must be devoted to the issue. Given the possibility that the MMC may recommend radical restructuring, and changes to commercial practices that may significantly impact on the companies such expenditure cannot be regarded as rent seeking. Lobbying, on the other hand, is unlikely to influence the process, may be disruptive for the legal team, and can be regarded as rent seeking.

Appearance before the MMC imposes far greater burdens than involvement with the OFT, where matters may be resolved at a more informal level. It is the requirement for the presentation of copious amounts of evidence that is responsible for the bulk of the costs, and for the greater part of the time that companies and their advisers are required to invest. Further costs are incurred by the lack of transparency in the regime, and the fact that the advisers are unable to always determine where to best direct their efforts. Even at late stages of the inquiry process the MMC does not indicate strongly the direction its deliberations are taking it. The inability to face complainants head on has also been criticised, although those who act for complainants are concerned that their clients be allowed anonymity in the process. The task for professional advisers is made more difficult by the apparent inconsistency in the process, and although reports are almost universally praised as being thorough and well researched they have only limited value in subsequent cases, and there is concern that conclusions may not follow from the evidence.

Particular criticism is levelled at the procedural straightjacket within which the MMC works. The problems at the beginning of the MMC process, and the costs incurred as a result are very apparent. The OFT will have, by the time a reference is made, significant expertise in the market, and will have reached some conclusions, although these will not be expressed publicly, on the potential public interest concerns raised. When the matter comes before the MMC this expertise is immediately lost, and a number of respondents have suggested that a more considered approach in the early days of the inquiry before the MMC would greatly reduce the requirements imposed on clients by the factual questionnaires. The solution to this problem is either to remove the statutory time limit for the reference, and allow the MMC the opportunity to gain a stronger feel for the market informally before demanding copious materials from those under investigation, or to create a system whereby the OFT's expertise is not lost. This leads inevitably to the arguments advanced in favour of a unitary authority, which are considered further in the concluding Chapter.



# Chapter nine — Regulated Settlement vs Trial, The United States of America and the Consent Decree

## INTRODUCTION

The United States' antitrust regime is the oldest of the modern regimes (although it has developed over time since the enactment of the Sherman Act), and has been influential in the development of competition law elsewhere.<sup>1</sup> The regime of the European Community is geographically closest to that of the UK, and has determined the shape of the development of UK competition law since the accession of the UK to the Community.<sup>2</sup> Although the Community regime has been the more influential in the UK in recent years the American regime is considered in this work because of the contrasts that it offers to that of the UK, and the presence too of some similarities in aspects of the regime that are given less emphasis in standard commentaries and student texts, but that in practice are of some significance. In the UK, in particular, there has been no alternative to the regulatory action of the two domestic agencies, and if the procedure is carried out to the full there is the inevitable involvement of two agencies in the investigative process. In the United States two agencies operating at the federal level may investigate conduct, but these operate only in the alternative, and any settlement of action negotiated with an agency arises against the backdrop threat of both agency and private-party court action. Nevertheless in each case there is a fundamental similarity — an agency of the Government investigates the possible anti-competitive actions of a company or companies. The primary purpose of this Chapter has been to consider the extent to which the UK experience, particularly in the burdens imposed by its operation, may be related to that of another regime, or whether, in relation to this comparison at least, they are peculiarly idiosyncratic.

Two prominent features of the American federal antitrust policy are the provision of treble damages,<sup>3</sup> (criticised on efficiency grounds by, inter alia, Breit and Elzinga (1974) and Page (1985)), which makes it attractive for civil plaintiffs to bring actions;<sup>4</sup> and the availability of

---

1 For the relationship between US and EC competition law see Goyder (1998), and contrast Gerber (1998).

2 The relationship between the domestic and Community regimes is considered further in the Annex, below. See also Whish and Sufrin (1993).

3 Section 4 of the 1970 Clayton Act (15 U.S.C. s 15) is in the following terms:

'Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.'

4 '... there are three major sources of inefficiency resulting from a private sector approach to eliminating anti-competitive behaviour. The first we shall call the *perverse incentives effect*; the second, the *misinformation effect*; and the third, *reparations costs*.' (At 354) Respectively these are (1) the fact that the plaintiff is under little inducement to avoid harm and, faced with *treble* damages may actually seek harm; (2) the problem of vexatious or nuisance claims; (3) the cost of assessing the harm if a valid case is shown. Note now, Kovacic (1996, 507): 'Success in pursuing private treble damage claims is more elusive today than 20 years ago, thanks partly to judicial adoption of the requirement that a private plaintiff prove that the defendant's misconduct has caused the plaintiff to suffer "antitrust injury".' See too Page (1980, and 1985). First (1995, 12) remains an advocate of private enforcement: 'Greater support can be shown for private enforcement ... because private litigants are better attuned to anti-competitive behaviour that causes harm and have an obvious incentive to get such behaviour stopped'.



criminal penalties for individual company officers (by virtue of the Sherman Act, s 2, below). Influential as these provisions are the majority of cases pursued by the federal authorities (the Department of Justice, Antitrust Division (hereinafter DOJ), and the Federal Trades Commission) are resolved by way of civil actions, and in the majority of these, without recourse to litigation: '[f]or many years, most civil antitrust cases brought by the Antitrust Division of the Justice Department have been resolved by consent decree' (Brantman, 1982, 303). Recent figures suggest that as many as 70% of DOJ civil cases are settled by this means (Weiner, 1995, 4).

The principal provisions of American federal law are found in sections 1 and 2 of the Sherman Act 1890 (for a fuller exposition of US antitrust law see, e.g., Sullivan and Hovenkamp, 1994). Sections 1 and 2 are in the following terms:

'Section 1 Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.'

'Section 2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.'

These provisions may be enforced by the 'several district attorneys of the United States, in their respective districts, under the Direction of the Attorney General' (Sherman Act, s 4). In practice the enforcement of the Sherman Act lies to a large extent with the DOJ. The Federal Trade Commission Act (FTCA) gives the Federal Trade Commission (FTC) powers which are similar to those of the DOJ in enforcing s 5, FTCA which condemns 'unfair methods of competition' and 'unfair or deceptive acts or practices in or affecting commerce'. It has been remarked that, effectively, the FTC's jurisdiction is so wide that it is 'empowered to *fill in the gaps* in the Sherman [Act] ... and to reach conduct or market conditions that *violate neither the letter nor the spirit* [of the Sherman Act]' (Jorde et al, 1996, 97). Given the extent of the overlapping jurisdiction (which has been examined by, inter alia, Kovacic, 1996) the DOJ and the FTC work in partnership, having 'devised an interagency clearance mechanism to insure that both entities do not simultaneously review the same antitrust matter or sue the same defendant' (Kovacic, 1996, 519-520). Nevertheless, Kovacic suggests that there are additional costs to industry in the dual enforcement, particularly with regard to the increasing use of consent decrees (1996, 520).<sup>5</sup>

5 'A ... cost consists of additional resources that companies spend to inform themselves about the decision making tendencies of two institutions rather than one. Regulatory outcomes can depend heavily on how individual regulators exercise their discretion. The importance of discretion in policymaking causes regulated firms to spend substantial sums to identify the tastes and idiosyncrasies of incumbent regulatory decision makers. The cost of learning and monitoring the habits and preferences of two bureaux is greater than the cost of mastering the traits of a single institution.'

The urgency to devote resources to understanding regulator preferences has increased as the DOJ and the FTC have resorted more extensively to consent agreements to make policy. The federal agencies issue consent agreements with an austere and, frequently, self-serving statement of the facts surrounding the consent and the rationale for its acceptance. Identifying the circumstances of the consent and the agency's reason for accepting some of the respondent's arguments and rejecting others requires a diligent effort to track public statements by enforcement officials and obtain informal access to key decision makers. Because the DOJ and the FTC have their own enforcement agendas and policy making idiosyncrasies, coping with this lack of transparency requires continuing efforts to monitor two sets of decision makers.'



While the regulatory bodies are empowered to bring criminal actions against those breaching the antitrust rules it is more usual (Melamed, 1996) for an attempt at negotiation to be made, the outcome of which (a 'consent decree') may bind the federal authorities, but not private plaintiffs who may still bring actions.<sup>6</sup> The focus of UK law is moving away from regulation and towards resolution by private actions. In America 'the observable trend of the agencies toward consent decrees' (Weiner, 1995, 8) is changing the nature of antitrust which 'has come to be seen more as policy and less as law ... enforcement efforts are occurring in a way that is more consistent with a bureaucratic regulatory culture' (First, 1995, 9). In particular consent decrees may allow for a more flexible approach to be taken by the agencies, and 'have become a means through which agencies seek to recast behaviour in accordance with their policy objectives' (Weiner, 1995, 6). Consent decrees have also allowed examination of conduct that might have been disregarded under the stringent case law standards (Weiner, 1995, 7). While this would flow naturally from a policy the implementation of which reduces an agency's costs, thus allowing it to consider cases that would otherwise have been put to one side, it suggests too that the strict standards envisaged by cases such as *United States v Grinnell Corp.* (384 U.S. 563 (1966)) may be circumvented in a system that is regulatory rather than litigious. As First (1995, 9) has noted:

'This type of regulation is group oriented, theory based, and forward looking. The decision-making model is consensual. Rigorous justification for particular decisions is not only unnecessary but may be unwise.'

Consent decrees are not forced upon defendants who must initiate the negotiations, and who clearly prefer to take this route, with its regulatory overtones, to that of litigation.

The decree, which may 'create new standards or regulate the parties' day-to-day business conduct' (Weiner, 1995, 8), relates to the conduct only of those parties who take part in the procedure, and does not create a general pro- (or pre-) scription (although there is evidence that, as with MMC/OFT reports some precedential value is attached to them by practitioners, see below). While it is generally assumed that there are benefits to a negotiated settlement of antitrust actions this proposition is by no means universally accepted (see, e.g. Kovacic, 1996, 540), and some strategic issues in the negotiation of consent decrees (in particular as compared to litigation) are considered in more detail below.

Although it is located in a different framework the consent decree may be usefully compared with the approach taken by the OFT/MMC, and demonstrates how an area of 'consensual' regulation may be carved out in the midst of a litigation-oriented system.

Unlike Fair Trading Act 'public interest' investigations the process tends to be highly focused, being more akin to that of the Competition Act. The differences may be as important as the similarities, however: the background threat of litigation, which may, (as was the case with IBM (Heller, 1994)) be very expensive, is mirrored in the UK only by the belief that co-operation with the OFT may avert the threat of a full-blown MMC investigation (see further the strategies recommended by lawyers to avert the threat of full-scale investigation in Chapter 8). As both the

---

*Contd*

Later Kovacic notes that: 'Even where the DOJ and the FTC have endorsed the same analytical methodology, firms will find it useful to identify the path of decision-making in each agency and account for the idiosyncrasies of each office to which a specific matter might be assigned.' (1996, 535)

6 A similar approach is taken in Canada where the Bureau of Competition Policy has adopted a well-publicised policy of education and negotiation, 'premised on the notion that the majority of businesses will respect the Act if they understand how it applies to their business conduct and affairs' (Addy, 1993, 867). Substantial penalties that may be levied are waived where companies approach the Bureau and settle the matter by negotiation.



regulatory authorities and the company subject to the procedure in the USA may be uncertain as to the outcome of litigation negotiation is a stronger feature of the consent decree than is the case where an MMC inquiry is concerned. The MMC has very wide discretion in the exercise of its powers and there is little prospect of *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) applying to any formal decision made by it; this is particularly so when the final views of these bodies are conditioned by detailed analyses of economic principles which the courts are unlikely to review. Further it is the relevant Minister who decides on action subsequent to an inquiry, and not the MMC itself.

A consent decree is not valid without court approval, but, until the enactment of the Antitrust Procedures and Penalties Act (the Tunney Act) in 1974 (15 USC 16) this approval could be taken largely for granted. The guiding dictum was that of the Supreme Court in *Sam Fox Publishing Co. v United States* (366 U.S. 683 (1961)) where the Court suggested that 'sound policy would strongly lead us to decline to assess the wisdom of the Government's judgment in negotiating and accepting [a consent decree]' (at 689). The Tunney Act, which now requires the courts to determine whether any consent decree is in the 'public interest' was introduced in order to counteract 'sweetheart deals', where 'powerful corporate interests used political influence to negotiate a consent decree that did not adequately address the issues raised in a lawsuit' (Anderson, 1996, 3). At the time of the passage of the Act Senator Tunney had expressed the hope that it would:

'transform a procedure which was generally accomplished in a series of private, informal negotiations between antitrust lawyers and attorneys for the defendant, into one that is exposed to the full light of public awareness and judicial scrutiny' (119 Cong. Rec. 24,598 (1973)).

This aspect of the process received much attention following the action taken by Judge Sporkin in refusing to authorise a consent decree negotiated between the DOJ and Microsoft in 1995 (e.g. Anderson, 1996; Furse, 1995c; Garza, 1995).

## THE CONSENT DECREE PROCEDURE

In *United States v Armour & Co* (402 US 673 (1971)) the Supreme Court stated that:

'Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.'

By virtue of the decree the defendant (company) waives his right to litigate issues raised, and the plaintiff is bound by the text of a consent decree which is not as it might have been written had the plaintiff established his factual claims and theories in litigation. Essentially then the process is an administrative one, but remains subject to the overriding supervision of the courts.

The federal authorities are largely free to determine their own internal procedures, but must comply with the requirements of the Tunney Act in relation to publicity of any proposed consent decree, and time limits allowed for intervention by interested parties. The requirements of the



Act are that: (1) the text of any proposed consent decree must be published in the Federal Register and filed with the court at least 60 days before the effective date; (2) this must be accompanied by a competitive impact statement (CIS)<sup>7</sup> and copies of any 'determinative documents' must be made available to the public at the court; (3) a summary of the decree and the CIS must be published in the appropriate newspapers; (4) each defendant must file with the court 'a description of any and all written or oral communications by or on behalf of such defendant ... with any officer or employee of the United States concerning or relevant to such proposal' (15 U.S.C. s 16(g)). Following the publication of the relevant details in the *Federal Register* the public has 60 days in which to make comments to the DOJ, and all comments received must in turn be published in the *Federal Register*, along with the DOJ's response, which must also be filed with the court (15 U.S.C. s 16(b), (d)).

### *The Tunney Act and the Meaning of 'Public Interest'*

The *Microsoft* case demonstrated the limits of the role of the courts in authorising consent decrees. By virtue of the Tunney Act '[b]efore entering any consent judgment proposed by the United States ... the court shall determine that entry of such judgment is in the public interest' (15 U.S.C. s 16(e)).<sup>8</sup> While it may to some extent be legitimate to draw comparisons between this public interest test, and that of the Fair trading Act, the comparison cannot be pushed too far. On 14 February 1995 Judge Sporkin of the US District Court for Columbia rejected the proposed consent decree negotiated by the Department of Justice and Microsoft (with the sideline participation of the European Commission) on the grounds that the decree was not in the public interest as it did not adequately redress the anti-competitive practices allegedly indulged in by Microsoft (*United States v Microsoft Corpn.* 56 F.3d 1448 (D.C. Cir. 1995)).

Both the DOJ and Microsoft appealed and the US Court of Appeals for the District of Columbia, in a judgment handed down in June 1995, overturned the judgment and removed Judge Sporkin from the case. The unanimous judgment of the Court of Appeals was that by reviewing practices not addressed by the complaint but raised by third parties the judge had violated the doctrine of the separation of powers. The Court held that the Tunney Act allowed consent decrees to be rejected only where they made 'a mockery of judicial power' (56 F.3d 1448 at 1462).<sup>9</sup> In the past

7 The Competitive Impact Statement must set out:

'(1) The nature and purpose of the proceeding; (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws; (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief; (4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding; (5) a description of the procedures available for modification of such proposal; (6) a description and evaluation of alternatives to such proposal actually considered by the United States' (15 U.S.C. 16(b)).

The CIS has been criticised by Grimes (1995, 27) as being 'costly, bureaucratic, and seldom useful'.

8 While the Act uses the phrase 'consent judgment' the more usual practice, adopted *infra*, is to refer to 'consent decrees'.

9 More fully the court held:

'When the government and a putative defendant present a proposed consent decree to a district court for review under the Tunney Act, the court can and should inquire, in the manner we have described, into the purpose, meaning, and efficacy of the decree. If the decree is ambiguous, or the district judge can foresee difficulties in implementation, we would expect the court to insist that these matters be attended to. And, certainly, if third parties contend that they would be positively injured by the decree, a district judge might well hesitate before assuming that the decree is appropriate. But, when the government is challenged for not bringing as extensive an action as it might, a district judge must be careful not to exceed his or her constitutional role. A decree, even entered as a pre-trial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face, and even



there have even been judicial hints that the Act might itself be unconstitutional, devolving powers to the courts that are rightly vested in the executive.<sup>10</sup> In his analysis of the likely impact of the judgment Anderson (1996, 3–4) summed up the attitude of the courts to the ‘public interest’ test prior to the judgment:

‘The “public interest” has proved to be a vague standard of review that initially was applied in a sensible manner: typically, judges declined to make an independent determination of whether a proposed decree was in the “public interest”, but rather determined if the decree was “within the reaches of the public interest,”<sup>11</sup> affording substantial deference to the judgment of the Department of Justice. Under this deferential standard courts rarely, if ever, rejected proposed decrees outright.

This does not mean, however, that judges routinely rubber stamp decrees. Judges who actually perform the review mandated by the [Tunney] Act undoubtedly take their duties seriously and would be surprised by an accusation that their reviews were not thorough. In some cases judges have required modification as a condition of approval. Despite the frequency of judicial approval, moreover, it is likely that the mere prospect of public scrutiny and judicial review has deterred attempts to swing sweetheart deals and has improved public confidence in antitrust settlements’.<sup>12</sup> [Notes added]

If the standard adopted by the Appeal Court in *Microsoft* is adopted it would appear that the scope for judicial review of the public interest has been severely restricted.<sup>13</sup> Anderson has attributed ‘the controversy over Judge Sporkin’s decision ... [to] the vagueness of the “public interest” standard for judicial review’ (1996, 36). Echoes with the criticisms leveled at s 84, FTA are strong, but the Tunney Act public interest test is directed not at a *de novo* hearing of the matter, but at the relationship of the proposed consent decree to the complaint as entered by the government. As such it must be considered primarily in relationship to the goals of the Tunney Act, and not to the goals of primary antitrust legislation. However, the process of the judicial review, in which new evidence put forward by concerned third parties may be considered, may also be a cost to those participating. The more perfunctory the review (and *Microsoft* would suggest more perfunctory reviews than have always been the case in the past) the less those costs will be.

As noted above a consent decree is not a bar to subsequent private litigation. In fact:

‘the announcement of a consent decree often triggers inquiries from affected parties. Before an action is filed, consent decrees are evaluated by consumer/purchaser attorneys to determine the likelihood of success [of an action for damages] ... Judges may be inclined to view a consent decree as *prima facie* evidence of a violation and would be unlikely to grant summary judgment in favour of the respondent’ (D. M., corr.).

---

*Contd*

after government explanation, appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot be interpreted as an authorisation for a district judge to assume the role of Attorney General.’ (*United States v Microsoft Corpn.*, 56 F.3d at 1462)

10 See, e.g., the dissenting comments of Judge Rehnquist in *Maryland v United States* (460, U.S. 1001 (1983)) (*AT&T*) which influenced the *Microsoft* judgment.

11 This derives in part from *United States v Gillette Co.* (406 F. Supp. 713 (D. Mass. 1975)) where the court held (at 716) that:

‘It is not the court’s duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest’.

12 Brantman too has noted (1982, 351) that:

‘At the very least, the legislative history indicates that the court is to make an independent determination, apart from the assurances of the [DOJ], that the decree serves the public interest in promoting competition’.

13 But see Anderson (1996, 3): ‘The “mockery” test for judicial review threatens to eliminate any effective role for the courts in reviewing antitrust consent decrees’.



## COSTS AND BENEFITS OF CONSENT DECREES

### *Introduction*

'The reasons that parties enter into a consent decree in an individual case are usually obvious and often compelling. Consent decrees resolve uncertainty about the defendants' legal duties, economize on enforcement and compliance resources, and enable government officials to address issues that are politically or economically important but legally ambiguous. Presumably, defendants do not enter into consent decrees when it is clear that they have not violated the law, but it appears that defendants commonly enter into consent decrees where the alleged violation is uncertain and the costs of the consent decree remedy are likely to be less than the costs of even a successful defense in litigation.' (Melamed, 1995, 13-14)

The main costs to any company of entering into the consent decree process are twofold: (1) the procedural aspects, during which the company may have to collate and present economic, financial and legal evidence to the DOJ/FTC,<sup>14</sup> and use internal staff or employ counsel to represent the company in the negotiation; and (2) the compliance cost once the decree is in place. There may further, be the unwelcome prospect of an increased threat of private litigation, although this would also likely follow any litigation between regulator and offender. The primary benefit arises when the costs of the alternative, which *may* be litigation, are greater.

The bounds within which the estimated values lie will be a determining factor, and the variance under conditions of negotiation is likely to be less than is the case under litigation. Further, while the company may have evidence on which to calculate the probability of loss of litigation the probability of litigation actually going forward will be based in part on the signals, which may be false, emanating from the DOJ/FTC.<sup>15</sup> There is a deliberate asymmetry in negotiating power introduced by the Tunney Act: the Government has the right to withdraw from the consent decree at any time before final judgment (and can thus return to a confrontational litigation) whereas the company cannot. Branfman notes that 'this right to withdraw has occasionally been used by the [DOJ] to induce defendants to agree to modify consent decrees' (1982, 345) and that the defendant 'has no leverage with which to induce its adversary to agree to a modification' (1982, 346). The attitude of the company decision maker to risk will also be a factor, and it would appear that 'defendants commonly enter into consent decrees where the alleged violation is uncertain and the costs of the consent decree remedy are likely to be less than the costs of even

<sup>14</sup> Lobbying costs would be a consideration here, but Branfman's survey of 180 consent decrees entered into in the first eight years of the Tunney Act's application suggests that little lobbying takes place. It will be recalled that the Act requires that all such contacts be notified to the court (15 U.S.C. § 16(g), above). Branfman found that (1982, 317-318):

'A review of the disclosures of communications demonstrates that the "lobbying" type of contacts which this provision was designed to expose have apparently not taken place. In fact, in more than 80% of the cases, no communications whatever were reported. Where communications were reported they were most frequently negotiating sessions which happened to include corporate employees who were not counsel of record, business-oriented discussions between defendants who happened to be defense contractors and the Department of Defense, or information furnished to a government regulatory agency at the agency's request or in a public filing. In only three instances did a defendant's filing disclose a contact which might be considered "political".'

<sup>15</sup> But note that the outcome of antitrust litigation is difficult to predict:

'Certain offences, to be sure, can be readily litigated in a predictable fashion: for example the *per se* rule against price fixing is well established. But in other areas of the law, where private antitrust actions are common, the precise nature of the activity which might be found unlawful is less clear. For example, a seller sued for damages stemming from an alleged Robinson-Patman Act violation ... cannot accurately predict, from the facts, eventual guilt or innocence, Refusals to sell, franchise termination, exclusive dealer arrangements, franchise territorial agreements, and other such "marketing violations" as well as non-horizontal mergers, involve so many combinations and permutations of fact situations that a confident prediction of guilt or innocence is difficult' (Breit and Elzinga, 1974, 341).



a successful defense in litigation' (Melamed, 1995, 13-14). Generally, whatever value is given to the individual components of this equation, 'the consent decree process recognises an inherent aspect of the litigation process, that is, that litigants often find it to their advantage to settle' (First, 1995, 9).

Where the prospect of imprisonment for individual company officers is raised the anticipated costs to the company of proceeding to trial, even discounting for the possibility of outright victory, which would then include the costs of imprisonment, would likely be very high. It has been noted that 'jail terms have a self-evident deterrent impact upon corporate officials, who belong to a social group that is exquisitely sensitive to status deprivation and censure' (Geis, 'Deterring Corporate Crime', in Ermann and Lundmann, 1978, 278). The threat of imprisonment, in 'real live federal penitentiaries, with real life federal convicts' (int. U7/2) is a real one and is employed as 'a tool during the course of a criminal investigation' (int. U1).

Although there may be a general presumption that matters will be resolved through the consent process ('in 90% of investigations you do not anticipate going to trial' (int. U5)) the defence will usually act as if preparing for trial, which can be a complex and expensive procedure, involving, for instance, 'filing motions of practice, ... filing motions to dismiss, or filing procedural motions, trying to get more discovery, or block certain discovery' (int. U7/2). The DOJ similarly believes 'the initial consideration is whether or not it looks like a violation' and that 'the consent decree is really downline ... that starts to appear when you have pretty well resolved that you are going to bring a case' (int. U4).

### *The burden of investigation*

Defence attorneys will become involved in antitrust cases following contacts between the DOJ and the putative defendant. This contact may often arise when the DOJ issues a civil investigative demand ('CID', or, in the case of the FTC, the subpoena), or may arrive less formally if the DOJ staff decide to first conduct interviews with the aim of being able to quickly establish whether the facts support further action. The CID investigation, which can 'pose extraordinary costs on the company' (int. U5) will require the collation of a substantial amount of material, alongside the involvement of economists and ancillary experts, and the investigative process may extend for some time, as, with the exception of mergers, there is no statutory timeline. The DOJ is aware of the burdens that such demands impose, in part because it has to consider carefully the material revealed, and there will be situations in which the officer handling the investigation within the DOJ will take steps to minimise these burdens. A senior trial attorney in the Department, who has handled around 25 cases, explained the position he adopts:

'I get a lot of documents that the justice department must review ... I am the kind of person I don't want to get a lot of these things sent forward if I don't think they are going to go anyplace because it is a burden and also it is my own credibility. When I send one of these things forward in part it is my reputation that is at stake in that I think this is worth pursuing. If I can resolve it short of that I think it is better. It is much fairer to the person being investigated' (int. U4).

One respondent felt that only rarely would the costs of the investigation amount to less than \$100,000 (int. U5). There is likely to be an element of open co-operation at this stage of investigation, particularly in the very early stages, although the risk that a client will not have been totally honest with his attorney, or may simply not know that personnel lower down the chain have engaged in illegal conduct, may temper the inclination of the defense attorney to



grant free access to all documents. The DOJ expects that defense attorneys will conduct their own investigation of the situation (int. U4), and this is borne out by comments made by the respondents who act for companies (ints. U5, U7).

### *Litigation*

#### *The risk of litigation*

As mentioned above it may be in the interests of the DOJ to exaggerate the threat of litigation, although views on this vary. One respondent commented on the difficulty of measuring resolve within the DOJ:

‘... there is a resource allocation issue, and in all of these bureaucracies you have to distinguish between the staff and the ultimate decision makers ... one of the things you go through is is this a runaway staff lawyer?’ (int. U1).

Another felt that ‘the government probably grandstands less than the private plaintiff’s bar ... you can get a reputation for being fast and loose with the facts, overstating cases, and that would be discounted’ (int. U7/1). The response of the DOJ respondent to the suggestion that the threat of going to trial may be overstated was ‘if you say that you are saying it in good faith, or at least I am, and I think most people in the office are as well’ (int. U4).

There may also be situations in which the Government is keen to proceed to litigation, considering the case to have precedential value ‘which will have a much greater impact than just one settlement’ (int. U1). Further the Government may use the threat of a wide ranging trial to encourage a narrowly focused settlement [noted int. U1].

‘Because there are as few cases as there have been ... it is very hard to predict in advance the outcome of those cases that do in fact go to trial’ (int. U5) which has the circular effect of further reducing the number of cases that do proceed to trial. The fact that cases may come before juries (in civil cases when monetary damages are being sought, or in criminal cases when the action is being brought for price-fixing or other per se violations) is also influential, making it harder both to anticipate the verdict and the determination of damages, which can become something of a lottery:

‘the plaintiff’s talking head will stand up the first time and show how prices were here and they should have been here, for X amount of years and therefore a huge bucketful of money has been accrued wrongfully by the defendant. The defendant will equally stand up and say we didn’t do it but if we did do it the gap was only about yea big, and therefore it is really only about this much damage out there ... and the jury, twelve good citizens, are then to go back in and compare the economic expertise of someone from UCal Berkeley and MIT ... they sort of figure out how do we right this wrong’ (int. U7/2).

Jurors are not informed that damages are to be trebled before the verdict is returned.

#### *The costs of litigation*

Trial costs in antitrust cases are very high, and ‘it is hard to have a short antitrust case’ (int. U1). There are structural problems with the judicial process that hinder the quick progress of civil cases – criminal trials of any ilk take precedence over civil cases, so ‘it is hard to get on the judge’s docket, and once you do you are going to have a trial that stops and starts’ (int. U1). In



a typical case, leading to trial, the pre trial stage will probably take around two years (int. U7/1). The discovery process is likely to be very expensive, especially as the trial looms. Photocopying charges alone 'will crest \$200,000 or \$300,000 a month', and one respondent 'would not be surprised if you showed me figures, for let's say the month leading up to trial, if a bill to a client was \$750,000' (int. U7/2). Another respondent referred to 'the recent NASDAQ investigations in which we were involved in which the investigation alone was a multi-million dollar undertaking, and the same was true of Microsoft' (int. U5). In fact the costs of the investigation are likely to outweigh the costs of trial ('if you treat the investigation as costing hypothetically \$5m ... litigation might cost as much as another \$3m' (int. U5); this formula is similar to that suggested by another respondent: 'if the whole thing cost a dollar to trial, you would get away with 50 cents' (int. U1)), and one issue in negotiating a consent decree is to do so at an early a stage as possible in the investigative process once it has become clear that there is a genuine concern and risk of litigation. Such costs appear to be endemic to complex litigation in America, and are not a peculiar feature of antitrust law.

It is not possible to give accurate general figures for the costs of trial, but it is clear that the consent process must be cheaper.

### *The strengths of consent decrees*

There appear to be no situations in which the DOJ will not consider a consent decree – no case is so serious that it cannot be settled by consent decree, except that 'there maybe some where you just can't fix it' (int. U4).

Where a consent decree is being sought 'it is the general practice of the [DOJ] that settlement negotiations by consent judgment be initiated by the defendants' (DOJ, 1987, Pt V. B). As has been seen the costs of going to trial are considerable, and the risks are hard to assess. Aside from resolving these problems consent decrees may have further benefits to defendants which are a result of the process of negotiation. In particular, 'because the consent decree is negotiated there will be more give and take around the edges and the nuances ... it will be a more finely tuned resolution' (int. U1).

### *The Government's position*

The regulatory authority may face a more complicated and fluctuating set of factors determining its decisions. While it is generally recognised that not all unlawful action can be detected, prosecuted, and punished the factors that influence the choice as to where best to locate resources may be subject to political dictates. Executive Order 12291, issued by President Reagan in 1981, required that agencies should act only to the extent that 'potential benefits outweigh political costs to society' (Sigler and Murphy, 1988, 99). In relation specifically to antitrust Kovacic suggests that 'the desired output ... is enforcement that obstructs only competitively harmful transactions and imposes the smallest informational demands necessary to explore legitimate competitive concerns' (1996, 513). First (1995, 11) who noted that '[e]nforcement resources must be directed to important areas of the economy; compromise and settlement enables agencies to use these resources more efficiently' summarised some of the potential dangers of administrative settlement of actions (1995, 11):



‘At some point, however, there is a price to pay for moving too far toward the bureaucratic end of the spectrum. Policies are no longer tested in an open litigation process to see whether the rules that antitrust enforcers propose adequately address real competition problems. The development of court-based antitrust doctrine is stunted, and it becomes difficult to judge the propriety of antitrust enforcement by its consistency with the law. Enforcement officials become too easily tempted to issue guidelines which achieve political objectives, but which also avoid hard factual problems and need not reflect the actual state of the law. ... It becomes tempting to engage in enforcement through “careful monitoring” of the situation, rather than through action. ... Antitrust, which has always been subject to political pressure, loses its voice as a law enacted by Congress and becomes just one more policy to be applied or not, depending on the overall economic and political policies of a particular administration.’

Some of these potential dangers are lessened by the Tunney Act review process, and that a consent decree is in place is no bar to private litigants either in respect of past harm or of continuing conduct falling within the scope of the decree. The Tunney Act’s requirements have necessarily imposed a direct cost on the Government:

‘First there is the out-of-pocket cost of compliance with the Act’s publication, notice and comment requirements ... Second there are manpower costs, as to which public data is unavailable. But it is interesting to note that statistics on the number of cases brought and the number settled by consent decree lend no support to an argument that the [Tunney Act] is forcing the [DOJ] to try a larger percentage of cases ...’ (Branfman, 1982, 352)

Not only are consent decrees likely to be cheaper than litigation, they may also be more effective in remedying identified harms, as ‘some consent decree remedies appear to go beyond what the government could realistically anticipate as a remedy in a contested case’ (Melamed, 1995, 14).

### *Compliance*

Where it is appropriate to do so consent decrees are likely to require the defendant to put in place a compliance programme and to submit itself to an element of continued supervision (a ‘Visitorial clause’ is a feature of the consent decree standard provisions set out in the DOJ Guidelines (DOJ, 1987). There is a large body of literature examining various aspects of compliance programmes in America (e.g. Adler, 1990; Beckenstein and Gabel, 1981; Murphy, 1991; Raven, 1977; Ravikoff, 1983; Whiting, 1961), and specialist manuals are available for the company and practitioner (see, e.g., American Bar Association, 1995; Comegys, 1992). In a 1981 survey of corporate counsel Beckenstein and Gabel, from a return of 859, concluded (1981, 462) that:

‘The most common practices ... were inside counsel advice on management decisions, an atmosphere of respect for the law, corporate provision of information on what the law prohibits, and formal policy statements about legal and ethical conduct’.

At that time the frequency of all aspects of compliance (measured against results obtained by earlier surveys including Whiting, (1961)) appeared to be on the increase, with the six most often cited reasons for instituting a compliance programme being:

‘avoidance of violations; avoidance of investigations; a board of directors’ recommendation; specifically required by a government agency; protection of top management; and a CEO/top management recommendation’ (Beckenstein and Gable, 1981, 464).



The majority of respondents felt that such programmes could be more effective than action taken by the enforcement agencies. Where the DOJ has not required an ongoing compliance effort as part of the decree, as in *AT&T (United States v AT&T, 552 F. Supp. 131 (D.D.C. 1982))*, the courts may request that some *sua sponte* supervision be introduced into the decree, or into the court's inherent jurisdiction, before approving the decree in the course of Tunney Act proceedings. While a programme that arises in response to a consent decree may be focused and well directed, the general costs of compliance have been summarised by Sigler and Murphy (1988, 70):

'A compliance program, like any program in an corporation, requires a devotion of resources and considerable administrative expense. There is the cost of the time and resources to develop programs and make the presentations. If, as in the antitrust area, it is a program which is to be given in small groups but across the corporation, the costs in lost employee time can be substantial. The marketing person who spends four hours listening to an antitrust compliance program has probably missed the opportunity to develop another sales opportunity for the company. The company must also pay for the time its lawyers spend in developing and reviewing the program as well as in pursuing questions that arise from the recipients of the program'.

Given that the general benefits of antitrust compliance programmes appear to be taken for granted in America (e.g. Raven, 1977, 482), and observing the trend towards increased compliance noted by Beckenstein and Gable (1981) it would appear that the *incremental* cost of a compliance programme following a consent decree might in some circumstances be minimal (and perhaps even negative where the company is able to focus a previously general approach to a specific problem).

### *Third party interests*

By virtue of 15 U.S.C., s 16 (a):

'a final judgment or decree ... brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action ... provided that *this section shall not apply to consent judgments or decrees entered before any testimony has been taken*' (emphasis added).

The effect of this is firstly that companies feel pressured to enter into consent decrees at an early stage ('before any testimony is taken'); that third party litigation is likely to follow any decree entered later than this, and is not barred in either event. Although invited following the publication of the proposed decree and the competitive impact statement in the Federal Register (Tunney Act, s 2(b)) third-party involvement in the process of negotiating the consent decree is not expected. The DOJ is required both to file with the district court and to publish its response to comments made (Tunney Act, s 2(d)).

Despite the requirements as to publicity and the time given in which to comment, Branfman noted in 1982 that 'the majority of decree proposals receive no comment whatsoever' and that '[w]here comments are received, they are generally few in number' (1982, 323). However, some cases have attracted significant interest. In *AT&T*, for example, the Court received over 600 comments, totaling over 8,000 pages. *Amicus curiae* participation is available, and 'most requests ... have been granted',<sup>16</sup> although motions to intervene<sup>17</sup> are usually denied as 'most courts have

<sup>16</sup> Branfman notes (1982, 337) that this form of participation 'has had a substantive impact', citing *United States v Phillips Petroleum Co.* (Civ No 75-974-HP (C.D. Cal.)) in support.

<sup>17</sup> By attempting to intervene the non-party seeks to join the case as a party, thereby seeking 'to create a justiciable controversy where by virtue of the settlement already agreed to by the parties, one no longer exists' (Branfman, 1982, 338-339).



been on the whole reluctant to become embroiled in an active proceeding' (Brantman, 1982, 325-326)). Thus public participation is most likely to take the form of a comment filed with the DOJ.<sup>18</sup> Responses to such comments are unlikely to be detailed: the DOJ internal guidelines suggest that 'it is preferable to answer comments by a single response, if possible, 10 days before the expiration of the waiting period' (DOJ, 1987, Pt V, A.3).

Ralph Nader has made representations in many cases over the years. In *IT&T*, for instance, he failed to persuade the court to reject the proposed decree, and then sought to reopen the case after it had been revealed that IT&T had offered to fund the 1972 National Republican Convention and that the government had been swayed in its approach to the decree by a concern that stronger remedial action would prejudice the interests of shareholders in the company leading to hardship. However, his organisation, the Center for the Study of Responsive Law, based in Washington, now finds it difficult to participate in the consent review process, and instead devotes its energies to 'engage reasonable people in dialogue ... to meet with the agencies and to try and open public debates' (int. U6) but not to mount legal challenges via the Tunney Act. Two other groups, the Consumer Federation of America and the Consumers' Union, are able to become involved occasionally, but usually in respect of selected merger cases.

Melamed (1995, 14) points to an externality of consent decrees that may negatively affect third party businesses:

'An individual defendant's private calculus of the costs and benefits of a proposed consent decree does not take into account the effects of the decree on third parties – on their expectations about law enforcement and the corresponding adjustments to their conduct. These effects can be substantial if the decree includes novel remedies or allegations of illegal conduct that are not well founded in the received law'.<sup>19</sup>

## CONCLUSION

The American system of antitrust enforcement is based partly around private rights, which may be invoked before the federal courts where federal law is applicable or in the individual state courts where the law so permits, and partly on civil and criminal jurisdiction granted to the DOJ and to the FTC. The adversarial nature of the process is central to the regime's operation, and the DOJ sees itself as 'being more in a law enforcement than regulatory mode' (int. U4). It is expected that the nature of enforcement in the UK will move in this direction following the entry into force of the Chapter I and II prohibitions of the Competition Act 1998. In fact the great majority of cases pursued by the federal authorities do not proceed to trial and are settled by way of the consent decree. The enactment of the Tunney Act was in part a recognition of the fact that the process now tends towards the regulatory, and that an additional level of supervision was required.

Whether a consent decree or a trial is envisaged the costs of investigation are similar, although as the timeline moves there will be an increasing divergence, and the investigation imposes

<sup>18</sup> 'Filing comments with the Justice Department has been the most popular means for non-parties to seek to affect proposed consent decrees, utilised with respect to approximately 30% of the proposed decrees. This popularity is probably explained by two factors. First, filing comments is relatively inexpensive; all that is required is writing a letter. Second, participation by comments is the only means of non-party participation which is guaranteed by the [Tunney Act]. Any other form of participation is within the discretion of the court and may be denied'. (Brantman, 1982, 329)

<sup>19</sup> Melamed's primary concern (1995, 15) is that 'a regulatory inquiry is fundamentally non-legal, It can thus erode the rule of law and leave government officials largely unconstrained'.



*burdens* on individual companies that are not dissimilar to those imposed in the United Kingdom. It is important that this be stressed in light of the various criticisms made of the investigative nature of the UK regime over the years. The process is fact driven and companies must be able to provide evidence relating to their commercial arrangements and their market positions. As with the UK the company's defence team will be typically headed by an out-of-house lawyer, and will include an economist and such other experts as are appropriate in the light of the circumstances; the burden on in-house management time is likely to be similar. The length of the investigation is generally more variable than is the position in the UK ('from four months to four years' (int. U1)) and is not dictated by the requirement to produce a formal report within a given period. That the *costs* of such investigations to an individual firm may be higher than in the UK appears to be a factor that is endemic to litigation in America, and not restricted to antitrust. However, some differences are clear, and lead to increased costs in the UK. The American authorities do not conduct industry-wide investigations. In cases dependent upon s 1 of the Sherman Act they will investigate only those firms that are considered to be 'combining', and in s 2 cases will focus exclusively on the monopolising firm, although information will of course be sought from third parties. The concept of the industry-wide investigation is an alien one within this structure.

An individual company responding in the UK to a MMC inquiry may be expected to provide a wide range of information about its commercial practices and position. Although an investigation by the DOJ or FTC may be more focused it appears from the responses set out here that the burdens of compliance are still substantial, and it would appear that the basic requirement of examining commercial conduct in the light of competition law is an onerous one whatever the fundamental shape of the regime.

Specific features of the UK regime examined in this work raise burdens beyond those found in the United States. In particular the dual agency approach of the OFT/MMC, requiring a duplication of response on the part of the company subject to investigation is *not* mirrored in the United States. The US authorities are not required to produce a report for the consideration of a third party, and this part of the UK process is only distantly reflected in the Tunney Act requirements. Following the *Microsoft* judgment it appears that the evidence that must be brought before the judiciary to allow a decree to be entered will fall considerable short of that presented in any MMC report. Further the US authorities may abandon the investigation, or reach a settlement at any point. There is no requirement to complete a predetermined process. In contrast the demand placed on the MMC that it follows an investigation through to a complete report appears cumbersome and unnecessary.

While critics of consent decrees point to the drawbacks of allowing the law to develop in a less certain fashion than would be the case with judicially derived precedent,<sup>20</sup> and the lack of participation in the process by third parties, that would tend to be a stronger feature in a mature regulatory system, both the government plaintiffs and the defence parties appear to find regulatory-style settlements to be preferable to courtroom trials. The former are cheaper and, being more flexible, may have a more powerful impact.

There is no suggestion that the American regime is any less effective than that of the UK. Indeed, although the increasing use of consent decrees has been criticised as leading to increased uncertainty there are many aspects in which the American regime may be considered as being more effective than that of the UK. Third parties have rights which may be effectively enforced,<sup>21</sup>

<sup>20</sup> This problem may be addressed following recent comments by Joel L Klein and Anne Bingaman, but companies are concerned that they will end up bearing the cost of the government's desire to make judicial precedent.

<sup>21</sup> Although note the concerns about treble damages referred to above.



companies may be penalised for past conduct, and the process is ultimately capable of judicial supervision. This in turn ensures that the antitrust regime as a whole operates within a system of precedent, such that the burdens imposed in the pursuit of individual cases may be recouped over the years as other actions are rendered unnecessary and the apparently vigorous compliance systems in place ensure observance with the generally established rule. It is significant in this context that the opinion within the DOJ is that novel settlements will likely be brought to trial in order both to ensure their legality, and also to embed them within the system.

The costs to a company under investigation are substantial, but there does not appear to be the general disenchantment with the operation of the regime that maintained in the UK prior to the announcement of the changes to be effected by the Competition Act 1998. The fact that the actions tend to be more tightly focused, both in terms of the practice and the parties under examination, that companies may rely upon antitrust as a sword as well as a shield in a way in which they have been unable to in the UK, and that the alternative to the regulated settlement is perceived to be even more costly and fraught with danger, all serve to make the regime appear to be more efficient than that in the UK.



# Chapter ten — Conclusion

## INTRODUCTION

When in 1994 Neil Hamilton, then a junior minister at the Department of Trade and Industry, blocked a referral recommended by the DGFT into bus services on the Isle of Arran he did so on the basis that the costs of the investigation could not be justified by the benefits that would flow from it. Ministers have repeated since the principle that the costs of competition law enforcement should be considered in relation to anticipated benefits:

‘The Secretary of State expects the DGFT to bear in mind the costs of an MMC investigation, both to the commercial parties and to the public purse, before deciding on a reference, and to consider whether the expected benefits are likely to be proportionate to the costs’ (HC 249–iv, 110, para 13).

It is a fact to be regretted that the data have not been available whereby these assessments can be made, although the OFT’s embargoed research paper on the issue (Morrison et al, 1996) suggests that benefits arising out of enforcement may be substantial even in small markets. As has been shown in the first part of this work it is not clear by what criteria the benefits of the application of competition policy should be assessed, making it fundamentally difficult effectively to criticise the regime. While suggestions are made in the conclusion to Chapter 3, above, that focus on changes to either market structure or conduct that can be expected to reduce deadweight welfare loss, the Fair Trading Act addresses wider, but unspecified, criteria. As economic respondents suggested, the quantification of benefits, even in a system with clearly stated goals remains a very difficult matter. This arises not only through the difficulties of assessing the impact of any one case in a dynamic market, but also ‘because if you look at existing cases what you find is virtually none of them leading to effective remedies’ (int. RE2).

The problem is compounded in the United Kingdom because policy goals are not clearly stated, and the ‘public interest’ test in particular is open to a range of interpretation. The problems raised by this were considered in some detail by the Select Committee (HC 249), and it is clear that both political and policy considerations play a role. The vagaries of the system are such that although respondents presenting cases to the OFT note that the rigours are significantly less than when the MMC becomes involved these advantages are to a considerable extent lost through the fact that the process before the OFT is more strongly politicised, and a company may invest energy trying to counter the prejudices and expectations of a single official.

Section 84 of the FTA,<sup>1</sup> which remains in force in the new regime, necessarily requires the MMC to have regard to many factors. Although those matters set out in sub-sections (1)(a)–(e) are not an exhaustive list of the considerations that may be considered as falling within the ‘public interest’ the MMC *shall* have regard to them in making its assessment. These matters are not

---

<sup>1</sup> See the Annex, below.



necessarily those that are considered by the EC Commission in the application of either article 86, or perhaps more appropriately article 85(3).<sup>2</sup>

## PROCEDURE IN THE PRESENT REGIME

While some respondents questioned in the course of this research doubted whether they should ever have been involved in the competition law system at all, none questioned the legitimacy of the regime, and all recognised that costs would be imposed under any system, whether it be administered through the courts or through a regulatory system. The focus of criticism has been on those aspects of the regime that impose burdens beyond those that are necessary to achieve an equivalent result. Some factors have consistently been raised in relation to this work, both by those involved in the three case studies and by those interviewed in relation to Chapter 8.

Four criticisms in particular have been made recurrently: (1) the seemingly arbitrary demands imposed by a rigid adherence to deadlines; (2) the 'kitchen sink' approach of the factual questionnaires and hearings; (3) the problems caused by the process shifting from institution to institution; and (4) the lack of transparency in the decision making process.

*(1) Time limits* The time limits imposed by the Fair Trading Act for the completion of a reference are arbitrary ones that bear no relation to the demands of any particular inquiry or the complexities of any particular industry. While the MMC is permitted to request an extension where one is needed respondents were under the impression that to do so was viewed within the organisation as a sign of failure, and that there was an embedded institutional resistance to overrunning the initial reference period. It may be relevant that the MMC has also been required to account more thoroughly for its time and costs to the Department of Trade and Industry following recent reviews of its performance. Legal advisers suggested that the need to stick to the deadlines could result in two main problems. Firstly the MMC is required to move very quickly at the outset simply because it must allow a reasonable time for the information that it requests to be made available. Secondly several respondents (Yellow Pages, Chapter 6, above, and Airtours, Chapter 7 above) suggested that in order to meet final deadlines the MMC was inclined to move quickly through those parts of the process where it was not constrained procedural rigidities, or by external factors outside its control, and that at these points the quality of the procedure could suffer as a result of the haste taken to 'catch up'.

The result is that initial demands for information are unfocussed, and often made when the MMC is still unfamiliar with the structure, practices and idiosyncrasies of the particular industry with which it is dealing.<sup>3</sup> Initial site visits may assist the MMC towards a more directed approach, but their value too was questioned by several respondents, and appear to be regarded more as an opportunity to make contact with the panel members and the reference secretary than as an integral part of the investigative process.<sup>4</sup>

<sup>2</sup> Article 85(3) provides for exemptions to be awarded in respect of conduct falling within the prohibition set out in article 85(1) where the practice in question 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;  
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

The criteria that the Commission applies are considered in Bouterse (1994), and have been criticised elsewhere as being overly determined by reference to price competition.

<sup>3</sup> This point was raised in particular by the Airtours team.

<sup>4</sup> The Airtours team noted that they felt that the panel members can have learned little from their visit to the company's site, and that there was no evidence in the report that the visit had any impact.



(2) *The 'kitchen sink'* The MMC is given the power in the Fair Trading Act to require persons to give evidence to it (s 85(1)(a)); to require the production of documents 'relating to any matter relevant to the investigation' (s 85(1)(b)); and to require 'such estimates, returns or other information as may be specified' (s 85(1)(c)). It is this last requirement in particular that firms find onerous. Although the evidence presented here suggests that the MMC may not be inflexible in its requirements for the specific format in which material is supplied, the presentation of lengthy returns and accounting data can be an expensive and burdensome matter.

While all respondents welcomed the opportunity to comment on a draft of the factual questionnaire, and noted the willingness of the MMC to accept material in a form other than that stipulated where the issue was brought to the MMC's attention, the concern remains that this most cumbersome part of the process results in much information being made available to the MMC that is ultimately irrelevant to the progress of the inquiry. Further, in complex monopoly investigations, a standard approach will be adopted in relation to all firms, and the burdens will fall most lightly on those who have been able to influence the MMC towards their view as to the format that the information should be made available in.<sup>5</sup> All of the respondents involved in the case studies noted that the completion of the questionnaire took a considerable time and a significant investment by the organisation. Many of the lawyers questioned felt that what really mattered was the statement of explanation accompanying the return, and that much of the material collected would never be used by the MMC (this view was strongly supported by David Burns of Airtours, see p 93, above). The MMC could perhaps reduce the burden at this stage by first holding very informal hearings with representatives of those likely to be subject to investigation and other affected parties to more fully familiarise itself with the industry before proceeding to the more formal requirements of the questionnaire.

(3) *The institutional split* There was unanimity amongst respondents that the current institutional arrangements are unsatisfactory.<sup>6</sup> In some cases, notably package holidays, the Office of Fair Trading will have had a long involvement with the industry, and the case officer will have developed a considerable expertise in the area. When the reference is made to the MMC, and taken up by part-time panel members who are unlikely to have previous expertise of the industry, this knowledge is immediately sacrificed. Both companies and their advisers have commented on the frustration of effectively having to start all over again at this stage. The problem becomes compounded when the MMC completes its work and ceases to be involved in the process. If undertakings are to be negotiated following the recommendations of the MMC those responsible for that negotiation may not themselves understand the reasoning behind the undertakings, and may not appreciate what will and will not work in the industry.

While an argument can be made supporting the separation of inquiry from the process of decision-making this carries with it considerable burdens in a system that is essentially investigatory, and where the decision-making process is so strongly bound up in the investigation. There are, in effect, two stages at which companies subject to UK competition law can be subject to adverse decisions. The first is that to make the reference which carries with it a substantial cost, above that incurred in the initial OFT investigation. (This cost is, as has been shown, substantial, but suggestions that the procedure is itself a form of penalty<sup>7</sup> should be considered in the light of the very high fines that have been imposed by the EC Commission which have extended to ECU 102m in the Volkswagen case). The second arises where a decision is made to implement a

<sup>5</sup> This point was raised by Thomas Cook in relation to the *Foreign Package Holidays* investigation discussed in Chapter 7, above, and by several lawyers, in particular RL2.

<sup>6</sup> Note that while the basic OFT/MMC split is being retained in relation to FTA investigations brought forward under the new regime (from 1 March 2000), the new Competition Commission, into which the role and staff of the MMC is to be subsumed, will include within its structure an Appeals Tribunal, and this some institutional readjustment is thus to be expected once the new regime is in place.

<sup>7</sup> This comment was made by one of the respondents in Chapter 7, but is not reported in that chapter.



recommendation made by the MMC. That companies are then subject to an additional transaction cost in the negotiation of this undertaking above that required by its implementation, is unwarranted. The case in favour of a bi-partite split, which is not mirrored at either Community level or in the United States, both of which are equally concerned to guarantee the rights of the participants in the process, is a weak one.

The research undertaken here suggests that both companies and their advisers would welcome a move towards a single investigative process, free of the dual agency split, which would likely reduce costs and would probably result in more effective undertakings being put in place.<sup>8</sup> A further integration of the entire process before one authority only would be favoured by all those who commented on institutional arrangements in the conduct of this research.<sup>9</sup> An avenue for appeal would not necessarily have to be permitted in such a case as, apart from the possibility of judicial review, there is effectively no avenue of appeal in the process at present.<sup>10</sup> Companies would, in effect, face the same threat but would have to expend less resource in countering that threat. Some of these concerns may be in part addressed in the new regime. In relation to scale monopoly investigations the procedure is likely to be significantly different, and more streamlined, under the Competition Act 1998. This follows if investigations are only launched following a finding of a breach of the Chapter II prohibition and then a strong suspicion of recidivism, or a concern that market structure itself makes abuse almost inevitable. In these cases the MMC will not, for example, be called upon to consider the question of whether a scale monopoly exists as that will have already been determined. Further it should be immediately clear to all parties what the main concerns and focus of the investigation are to be, allowing a more directed and focused approach during the course of the investigation. This will not be the case, however, in relation to complex monopoly investigations where the procedure may be expected to be substantially the same as that operating at present.

*The complex monopoly problem* Other problems are also apparent, and it is clear that in other respects avoidable costs are being incurred. This is the case most obviously in relation to complex monopoly investigations where all in an industry are subject to the same strictures irrespective of the conduct of the individual firm as long as the jurisdictional threshold is met. Complex monopoly investigations are a peculiar feature of the domestic regime which impose considerable costs on all parties, although not all may be exploiting the circumstances that give rise to the monopoly in the same way. In the case of the travel inquiry considered in Chapter 7 it is clear that Thomas Cook was involved in the process only marginally before the OFT, and was barely following the matter, that Airtours was prepared to give the OFT the undertakings it wanted, and that both these and other parties were dragged into a costly inquiry when Thomson Travel Group refused to agree to such undertakings. This refusal cost Airtours approximately £1m, and resulted in undertakings being finally recommended that were considered less effective than those that Airtours was originally prepared to accept. Thomas Cook may not, had the reference not been made, have been required to modify its conduct at all. This might suggest that in fact the MMC intervention caught a practice that would have gone unnoticed by the OFT. A more likely scenario however is simply that in complex monopoly inquiries differential treatment cannot be meted out to different companies following the report. To do so would invite a judicial challenge by way of review. It is the fact that the entire industry is equally affected that appears

<sup>8</sup> If the agency negotiating the undertaking has invested heavily in the examination of the abusive conduct, it is likely to feel a stronger ownership of the undertaking and to be more committed to its effective implementation and monitoring. See too the views of David Burns, Chapter 7, p 94, above.

<sup>9</sup> This view was advanced by the principals interviewed in relation to Chapters 6 and 7, and by many of the lawyers interviewed in relation to Chapter 8. Only one lawyer supported the present bi-partite split.

<sup>10</sup> This will change from the starting date of the Competition Act 1998 when appeals become available to the Appeals Tribunal of the Competition Commission.



to make complex monopoly inquiries acceptable to those involved. This fact was suggested by a number of advisers with expertise of both scale and complex inquiries.

Where a company is prepared to accept at the outset undertakings that in the OFT's view would remedy the situation there appears to be little justification, in the case of that company, in proceeding with a reference. The difficulty is to devise a system which would allow some companies to be separated out from the process, without damaging the integrity of the inquiry for those remaining involved. If a commitment to retaining complex monopoly references is maintained in the long term such an involvement on the part of the 'innocent' is probably unavoidable, as it would undermine the very nature of the process to deal only with those companies not amenable to offering undertakings in lieu of a reference.

*Transparency and standards* A lack of transparency in the decision making process may be unavoidable in the context of a test as vague as that of the 'public interest'. Where arguments are advanced in favour of the retention of this formula they tend to focus on the role of the consumer interest. The Consumers' Association, however, argued that consumer interests would be better protected by way of a consistent application of well-thought out economic criteria, and guidelines of the sort followed in some cases by the American authorities. The EC Commission appears to be moving towards this position and has recently adopted guidelines in relation to the definition of the relevant market, as has the OFT in relation to the Competition Act 1980. While the OFT has commissioned a range of research papers these come with disclaimers of their status as being an official representation of the views of the Office. The Director is required to publish guidance under the Competition Act 1998 as to its operation, and drafts began to be published in March 1998. Companies and their advisers are unable to gauge during the course of an inquiry which issues are being focused on, and what analytical framework is being adopted.<sup>11</sup> Economic consultants, who are increasingly involved in the process, are particularly frustrated by the lack of clarity.<sup>12</sup> The effect of this is that a company must respond equally to all matters raised, and this problem is compounded by the all-encompassing nature of the factual questionnaire. Early indication by the MMC of the focus of its concerns, perhaps in informal meetings held at the outset of their inquiry, would go some way to alleviating the burdens imposed by these uncertainties.<sup>13</sup> The development of a consistent approach across inquiries would be welcomed by advisers and industry alike, and while factual circumstances may change from industry to industry basic economic analysis and modelling, coupled to a consistent emphasis on, e.g., the prominence to be given to consumers' 'rights' should be attainable. (It has already been noted in Chapter 8 that American agencies may have access to 'better tools' (int. RE1).) This would allow greater reliance on the previous reports published, and increase the confidence of industry in the process. It was very clear during the course of the research that the factual elements of the reports were highly regarded by companies, but that the reasoning that was applied often appeared to be unrelated to the facts. Such comments were made consistently by advisers, and did not appear to be related to disappointment in unfavourable results.<sup>14</sup>

A more transparent standard, operated within the parameters of well-drafted guidelines, would

11 See, e.g. comments made by Paul Fry in relation to the inquiry into *Classified Directory Advertising Services* and David Burns in *Foreign Package Holidays*.

12 See, e.g., RE2.

13 As discussed above the position may become clearer under the Competition Act 1998 if the Chapter II finding acts as a guide to the concerns raised in any subsequent FTA reference.

14 However, reports are generally unchallenged. While judicial review remains a possibility the discretion given to the MMC is a wide one, and judges may be reluctant to involve themselves in detailed economic analyses. The view of Mr Widmer, for example, (Chapter 5) was that judicial review would never succeed. Notwithstanding the fears expressed by Sir Gordon Borrie (1994), the evidence suggests that judicial review does not provide a realistic possibility of challenge to conclusions reached by the MMC.



reduce the scope for erratic enforcement, and reduce costs of those subject to the procedures, while at the same time going some way towards clarifying the standards by which the efficacy of the regime might be judged. This was a point emphasised in particular by the Consumers' Association and the National Consumers Council, both of which argue that consumers in particular suffer through the somewhat haphazard treatment accorded to individual cases. However, such a standard may not be readily available, and cannot be readily evinced, for example, in the application of either arts 85(3) or 86 at Community level. The Consumers' Association indicated that any stable criteria would be preferential to what it perceives as the current ad-hoc nature of reasoning. Under the Competition Act 1998 the OFT is in the process of producing guidelines which are far more comprehensive than those published under the Competition Act 1980 or the Fair Trading Act where only limited guidance has been available. Although the guidelines at present focus on procedural issues they do cover such aspects as market definition, and may be expanded to cover particular abusive practices, some of which are referred to in the general guidance on the application of the Chapter II prohibition.

### *Third party involvement*

The language of rights in relation to competition law in the UK is conspicuous only by its absence, and injured third parties can have little expectation that the law will allow them redress.<sup>15</sup> The Fair Trading Act recognises only to a limited extent the role to be played by third parties in references. This recognition is found in s 81(1)(a), which provides that the MMC shall

‘take into consideration any representations made to [it] by persons appearing to [it] to have a substantial interest in the subject-matter of the reference, or by bodies appearing to [it] to represent substantial numbers of persons who have such an interest’.

Although respondents have suggested that there are benefits to third parties in the domestic system in as much as it costs little, if anything, to make a complaint, which may possibly be taken up by the DGFT, the system of investigation as presently constituted does not afford such third parties an effective role in the process. Two active third parties were central to the matters considered in Chapters 5 and 7. In *United Automobile Services* (Chapter 5) the OFT inquiry was driven following a complaint made by a small entrant competitor. However, the procedure stalled while the company attempted to respond to the OFT's requests for further information, and the company was eventually forced out of business before the matter was concluded. In *Foreign Package Holidays* (Chapter 7) the Association of Independent Tour Operators was widely believed to have been instrumental in engineering the reference, and the organisation attempted to involve itself as much as possible. However, it was able to enjoy the benefits of legal

<sup>15</sup> Note, however, that s 35 of the Restrictive Trade Practices Act allows some redress. Section 35 provides that where a registrable agreement is not registered ‘the obligation to comply with [subsection (1)(b)] is a duty owed to any person who may be affected by a contravention of it and any breach of that duty is actionable accordingly subject to the defences and other incidents applying to actions for breach of statutory duty’. Rights will be available under the Competition Act 1998, although there is no express provision to this effect in the Act. It was confirmed in the debates that the interpretative obligation of s 60 is intended to apply equally to third parties, whose rights will thus approximate those available on the basis of the direct effect of Community law (see the Annex for a further discussion of this point). In the House of Lords, Lord Simon confirmed that ‘... third parties have a right of private action. Our clear intention in framing this Bill is that third parties may seek injunctions or damages in the courts if they have been adversely affected by the action of undertakings in breach of the prohibitions. This is an important element of the regime. There is no need to make explicit provision in the Bill to achieve that result. Third party rights of action under the domestic regime are to be the same as those under arts 85 and 86’ (Hansard (HL) 25 November 1997, col 955).



representation only through a fortuitous family connection, and did not consider that it was adequately involved in the review of the undertakings following the publication of the report. Although AITO believes that it did benefit from the inquiry the benefit was an indirect one and arose out of the publicity given to its argument in the media, not out of remedies imposed following the reference.

Injured third parties are likely to suffer an inequality of arms,<sup>16</sup> and to have less experience of the regulatory environment than the monopolist whose acts they seek to challenge. Both AITO, and 'Another'<sup>17</sup> felt intimidated by the hearings that they attended and did not understand properly the operation of the system that they were seeking to influence. It would cost the MMC little to inform those involved at this level of the procedures and the aims of the inquiry, and to reimburse the direct costs of, for example, travel. This would have been welcomed by both AITO and Another, and a similar point was made by Kingston Communications.<sup>18</sup>

While it is clear that third parties do respond to the publicity given to references, and in some cases do so in great numbers, many of these unsolicited responses appear, on the basis of the survey conducted in relation to *Classified directories*, to be unconnected with the operation of competition law. Thus the MMC was obliged to deal with several hundred complaints by businesses in the Coventry area about the rescoping of the local Yellow Pages directories. In *United Automobile Services* complaints made to the OFT were also made to the Prime Minister, and related to environmental concerns rather than to competition matters per se. Many of these representations therefore do not appear to come from those who fall within the terms of s 81(1)(a).

Although the prospect of greater third party involvement may raise fears that the costs to the parties under investigation may increase it is difficult to envisage how the response could be more intensive than that required already by the MMC. Indeed, third party involvement might go some way to clarifying at an early stage the concerns raised in the case, and might allow for greater focus in the course of the investigation, possibly leading to a fall in costs.

## THE BENEFITS OF APPLICATION OF THE LAW IN INDIVIDUAL CASES

The focus of this work has been on the costs of the application of the policy. These are more readily assessed than are the benefits, and are more to the fore of the concerns of those subject to the regime's strictures. The main reason justifying the focus on costs has been the belief that results obtainable under the investigative process here considered will be equally obtainable via the full-scale implementation of a prohibition regime, and perhaps by a regime heavily dependent on private litigation, as is the case in the United States. There is, however, no research into the general efficacy of competition regimes at a comparative level.

Some of the problems associated with assessing the benefits have already been noted above. In the case studies considered here the picture that emerges is not a convincing one. In *United Automobile Services* (Chapter 5) there were clearly no direct benefits. The dynamic nature of the market, and the pace at which the OFT was able to react, meant that by the time the report was published the complainant was out of business. The impact of cross-over benefits is considered further in that chapter, and as was shown is not considered to be an influential one. In *Classified directory services* (Chapter 6) the transfer of income from the monopolist to its customers is

<sup>16</sup> See, e.g., the position of AITO outlined in Chapter 7.

<sup>17</sup> See Chapter 6, above.

<sup>18</sup> See Chapter 6, above.



noted, as is the fact that whether this represents a benefit is a matter of judgment, and not one that can be resolved by quantitative analysis. In the long term none of those questioned in relation to the study felt that there would be a significant impact from the undertakings implemented, a fact which was suggested in Catherine Bright's minority report. Neither Airtours nor AITO expected there to be substantial benefits flowing from the undertakings to be implemented following *Foreign package holidays*. It was not felt that the report would lead either to lower prices, increased ease of entry into the industry, or greater consumer choice. However, the point was also made that a significant change in, for example, pricing, in a large industry could by itself produce benefits that would outweigh the costs of a great many individual cases. Changes to insurance selling practices may increase competition/reduce barriers to entry in that market with resultant benefits accruing to consumers, and a fall in deadweight welfare loss (see p 98, n 22, above).

Nevertheless many respondents expressed general scepticism as to the value of the process in individual cases generally. The limited research that has been done on attitudes to this area of law generally in the United Kingdom suggests that the law will in most cases be respected irrespective of the prosecution of individual cases (Frazer, 1995).

## THE 'NEW' REGIME

The heart of the competition regime introduced by the Competition Act 1998 will be radically different from that considered in this work.<sup>19</sup> The enforcement of the prohibitions in Chapters I and II will proceed on a different basis, and will require only that the Director shows that, in a specific case a specific practice falls within either section. In order to assist him in this task, and in order to increase transparency for business and reduce the uncertainties caused by operating a system out of alignment<sup>20</sup> with that of the European Community, the Community approach will in most cases be determinative of the approach taken. This obligation arises from section 60 of the Act, which provides in part that:

'The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community'.

Third party rights will flow through the prohibitions on the same basis as rights available under articles 85 and 86 EC through direct effect.<sup>21</sup> References will no longer be made under the Competition Act 1980 which is, in its relevant sections, being repealed but, remarkably, the Act leaves in place the provisions of the Fair Trading Act 1973 relating to both scale and complex monopoly investigations. Commentators perhaps expected the latter provision to be retained, as the Community approach towards 'joint dominance' is widely considered to be unsatisfactory, and would not extend to many of the cases in which the MMC has found a complex monopoly

<sup>19</sup> See the Annex, below.

<sup>20</sup> This word has been chosen with some care, see Maher (1996).

<sup>21</sup> The first-published draft of the Bill made specific provision for the place of third party remedies. This was later removed, although it was repeatedly affirmed by the sponsoring Minister in the House of Lords that such rights would be available as a matter of general principle. Lord Simon for the Government expressed his view that the cumulative effect of the relevant provisions was still such as to allow rights to injured third parties, noting that the Bill included 'provisions to facilitate rights of private action in the courts for damages' (Hansard (HL) 30 October 1997, col 1148). See also note 15, above.



to exist. The retention of the scale monopoly provisions was unexpected and has attracted criticism.<sup>22</sup> The case advanced by the DTI (1997a) is that:

‘A prohibition based approach is, however, less able to deal with the situation where, for example, an individual abuse has been tackled but where there is a prospect that other abuses by the dominant company may continue in the future. In such a situation, structural remedies to reduce the dominant position of the firm concerned may be more appropriate than relying on the prohibition alone to deter future abuse. Taking action to reduce market power in this way would be possible under the scale monopoly provisions of the [FTA], but is not readily achievable under a prohibition-based approach. There is accordingly an argument that the scale monopoly provisions of the FTA should be retained for use in these limited circumstances.

We are therefore currently not persuaded that it would be right to repeal the scale monopoly provisions. However, we consider there is a case for restricting the use of these provisions to exceptional circumstances. Therefore we believe that they should only be used where there has already been proven abuse under the prohibition *and* the DGFT believes there is a real prospect of future different abuses by the same firm. In such cases the matter should be investigated by the MMC.’ (paras 6.22–6.23)

The Monopolies and Mergers Commission will cease to exist once the new regime is bedded down, and its role will be taken over by the newly created Competition Commission, to which currently serving members of the MMC are expected to move. The Competition Commission will serve both as a tribunal to which appeals against decisions of the Director may be made in the circumstances set out in the Act, and as the investigative body for the purposes of references made under those provisions of the Fair Trading Act that remain in force.<sup>23</sup> Chinese walls will be created, and the Tribunal will be separated from the investigative function.

The procedures governing scale and complex monopolies under the new regime are likely to be substantially the same as those currently in place, and none of the relevant requirements of the Fair Trading Act have changed, although the Director has now been given the power to impose interim measures where he believes that these are necessary to prevent serious harm. The changes that have been made to the power of the DGFT to compel the presentation of evidence have been considered in the Annex. There will, however, be some change to the scope of investigations under the scale monopoly provisions. Because these will be invoked only following a prior finding of dominance and abuse the MMC will not raise again the question of whether a monopoly position is held, and whose favour it is held in. Although section 48 of the FTA is left intact there will, if the approach suggested by the DTI is followed, be no further cases in which references are made ‘limited to the facts’. The MMC will then consider only the questions raised in s 48(c)–(d), and s 49(1)(b). The same will not be true of complex monopoly inquiries which are likely to be conducted in exactly the same way as at present.

The retention of scale monopoly investigations is a curiosity, and the reasoning advanced by the DTI is unconvincing. The requirement that the DGFT will be expected to make a reference only

22 See e.g., Scholes et al (1998, 37): ‘In para 6.18 of the Explanatory Memorandum, the DTI proposes that the current provisions of the [FTA 1973] relating to complex monopolies should be retained in addition to the introduction of the Chapter II prohibition. We are very pleased that the suggestion to this effect made in our October 1996 observations to the DTI on the draft Competition Bill circulated last summer has found favour. ... In paras 6.21–6.24 of the Explanatory Memorandum, the DTI states that to a very large extent the introduction into UK law of the prohibition on abuse of dominant position will remove the need for the scale monopoly provisions of the [FTA]. It goes on, however, to suggest that it may be necessary to retain the scale monopoly provisions in a limited form ... we agree with the first statement. The introduction of the Chapter II prohibition will indeed make the scale monopoly rules in the FTA redundant. We do not, however, agree that the latter should be left in place to deal with exceptional cases’. See also Furse (1998).

23 The Competition Act 1998 makes no change to the system for merger control in the UK.



in situations where there has both been an abuse and further abuse is likely points to the anomaly raised by the retention. While the DTI points to the need to be able to deal with embedded structural monopolies where market relief is unlikely to be available, the further requirement that there be an abuse invalidates the need for a FTA reference. An abuse should fall to be dealt with solely under the Chapter II prohibition, in a way consistent with Community law. The provision of penalties that, consistent with those provided for under Regulation 17, may be set up to 10% of UK turnover should in itself be adequate to ensure compliance with the prohibition. The effect of this sanction will be further enhanced if, as is likely, recidivism carries a high tariff. A company that has once breached should not be subject to an additional penalty by way of the imposition of a cumbersome procedure where a more streamlined approach under the prohibition would be available. Such an approach is also inimical to the efficient operation of the regime. The efficacy of enforcement will not be enhanced, but the cost of enforcement through the reference system is likely to be significantly higher than will be the case through the prohibition. Further, the much-longed for consistency introduced by section 60, and repeatedly emphasised by ministers in the passage of the Act, will be lost if the MMC is forced to apply, to a recognised abuse encompassed within Article 86, the public interest test of s 84 of the FTA. An argument may also be made, however, that the imposition of fines is a somewhat blunt instrument when contrasted with the range of remedies available under the Fair Trading Act 1973.<sup>24</sup>

A stronger case can be made for the retention of the complex monopoly reference system, although even here some of the same concerns can be raised. While some of those who presented evidence before the Select Committee<sup>25</sup> suggested that the treatment of complex monopolies in the domestic regime remained one of its undoubted strengths, little evidence is adduced to support this conclusion. As noted above the costs of complex monopoly investigations are considerable, and there are areas in which efficiencies could be achieved through reforms. Structural remedies have not, in recent years, been imposed on complex monopolies, and remedies imposed on, for example, travel companies,<sup>26</sup> could equally be imposed through a decision taken in respect of the Chapter II prohibition, requiring that an infringement be brought to an end. Although it will not be possible to compare costs of enforcement of the two systems until the prohibitions are in place, the conclusion suggested here is that the reference system set out in the Fair Trading Act should be comprehensively abandoned in favour of the prohibitions of the new regime.

<sup>24</sup> It is in part this recognition that has been used to justify the retention of the scale monopoly provisions of the FTA.

<sup>25</sup> See the Annex, below.

<sup>26</sup> Considered in Chapter 8, above.



# Annex — The Competition Regime

## INTRODUCTION

This work is concerned primarily with two specific aspects of the UK regime, namely investigations into anti-competitive conduct under the Competition Act and into the operation of a monopoly situation under the Fair Trading Act and the discussion here focuses on those issues.

Characterised as a 'multicephalous beast' (Whish and Sufrin, 1993, 25), UK competition law is highly fragmented. Whilst common law rules, such as the restraint of trade doctrine, may be applicable to some cases, the area is predominantly one of public regulation. During the period covered by the research set out in Chapters 5–9 four Acts of Parliament lay at the core of the regime: the Fair Trading Act 1973; the Restrictive Trade Practices Act 1976; the Resale Prices Act 1976; and the Competition Act 1980 (all as amended). These are supplemented by unique rules for the 'special sectors' – privatised utilities, broadcasting and the media. In recent years there have been several proposals to unify the regime, giving it far greater coherence, and in October 1997 a Competition Bill was introduced in the House of Lords by the Government.<sup>1</sup> A reason for the diversity of sources may be found in the development of the law, which has progressed 'in a haphazard way' (Freeman and Whish, 1991, I-443).

## THE ORIGINS OF THE LAW

Whilst modern competition law is often located as beginning with the Sherman Act 1890, the roots of competition law lie much deeper. The Sherman Act itself, it has been argued, is based on the Constitution of Zeno promulgated in A.D. 483 (Wilberforce, *et al*, 1966, para 110). The earliest known Roman legislation, the *Lex Julia de Annona*, enacted circa 50 BC, predates the Constitution by over 500 years. In England laws against private monopolies have existed since before legal memory. The Domesday Book makes reference to the crime of foresteal (or forestalling), and various Saxon kings had taken action against diverse trading practices. At the time of the Magna Carta legislation provided that 'all monopolies without exception, even those granted by kings, were considered contrary to the law, because they restricted the freedom of the individual.' (Wilberforce, *et al*, 1966, para 115). Much legislation followed, including the 1349 Statute of Labourers which, in its introduction of the requirement that merchants

<sup>1</sup> See, prior to the introduction of the new law, the Fifth Report of the House of Commons Trade and Industry Select Committee: 'UK Policy on Monopolies' (1995) HC-249. See too the proposals of the National Consumer Council (1994). The Bill was first introduced by the DTI in 1997, and then brought forward in October. The references to the debates are as follows: Second Reading (HL) (1997) Hansard (HL) 30 October; Committee stage (1997) Hansard (HL) 13 November, 17 November and 25 November; Report stage (1998) Hansard (HL) 9 February, 19 February, and 23 February; Third Reading (1998) Hansard (HL) 5 March. In the Commons: Second Reading (1998) Hansard (HC) 11 May; Standing Committee G, (1998) 21 May – 25 June; Third Reading (1998) 8 July; House of Lords, consideration of Commons amendments (1998) 20 October. Royal Assent was granted on 9 November 1998.



overcharging should pay multiple damages to injured parties, pre-empted the American treble damages suit.<sup>2</sup> Penalties tended to be severe. A statute of 1266 provided that the punishment for raising prices above legislated levels for bread and ale could include amercements, pillory or tumbrel. In the legislation enacted in the reign of Edward VI (2 Edw. 6, c. 15) it was provided that those in breach 'shall forfeit for the first offence Ten pound ... or twenty days imprisonment and shall have only bread and water for his sustenance'. On the occasion of a second offence a fine of £20 was to be paid or the offender was to be pilloried. On a third offence the fine was to be £40, 'or the offender shall sit in the pillory and lose one of his ears, and also shall at all times after that be taken as a man infamous'.

Early definitions of monopolies related to the grant of exclusive rights from the crown. Thus Stigler (1982, 2) quotes the *Penny Cyclopaedia* (1839):

'It seems then that the word monopoly was never used in English law, except when there was a royal grant authorizing some one or more persons only to deal in or sell a certain commodity or article.'

The definition advanced by Coke in the *Institutes* was approved by the US Supreme Court in *Standard Oil Co of New Jersey v US* ((1911) 221 U.S. 1):

'A Monopoly is an Institution, or allowance by the King, by His Grant, Commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working or using of any thing, whereby any person or persons, bodies politic or corporate are sought to be restrained of any freedom, or liberty that they had before or hindered in their lawful trade'.

Such monopolies were increasingly granted from the mid-1300s. In particular, in Elizabethan England the system of Industrial Monopoly Licences was heavily abused as a mechanism for raising funds without the inconvenience of consulting Parliament. Although Parliament protested the Queen was able to persuade it to drop a Bill that would have curbed the practice. The practice was a matter of sufficient notoriety to be satirised in popular drama.<sup>3</sup>

It was left to the courts in 1602 to rule that a grant of a monopoly to the maker of playing cards to one Darcy was illegal and void (*Darcy v Allin* (1602) 11 Co. Rep. 84b (also cited as the *Case of Monopolies*)). Even at this time the arguments against monopoly practices were becoming well rehearsed, and the court found that there were 'three inseparable incidents to every monopoly:

<sup>2</sup> Section 7, Clayton Act 1914.

<sup>3</sup> In *The Devil is an Ass* Merecraft, 'the Great Projector' advances schemes for the creation of monopolies.

One such is for toothpicks:

'For serving the whole state with toothpicks;  
Somewhat an intricate business to discourse, but –  
I show how much the subject is abused  
First in that one commodity! Then what diseases  
And putrefactions in the gums are bred  
By those are made' of adulterate and false wood!  
My plot for reformation of these follows:  
To have all toothpicks brought unto an office,  
There sealed; and such as counterfeit 'em, mulcted.  
And last, for venting 'em, to have a book  
Printed to teach their use, which every child  
Shall have throughout the kingdom that can read  
And learn to pick his teeth by. Which beginning  
Early to practise, with some other rules,  
Of never sleeping with the mouth open, chawing  
Some grains of mastic, will preserve the breath  
Pure, and so free from taint' (Jonson, 1616, IV, iii)



(1) the increase of prices; (2) the deterioration of quality; and (3) the tendency to reduce artificers to idleness and beggary' (Wilberforce, *et al*, 1966, para 129).

The situation was resolved in 1623 with the passing of the Statute of Monopolies, which declared that 'All Monopolies ... are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none effect and in no wise to be put into use or execution.' An exception was made for patents for a period not exceeding twenty-one years save where these operated to raise prices or to damage trade. Monopolies could still be granted to trading corporations and guilds, a practice made much use of by Charles I. In the Great Case against Monopolies, *East India Company v Sandys* ((1685) 10 St. Tr. 371) it was held that a distinction could be drawn between monopolies operating *within* the realm, and those established in order to compete *outside* the realm. In the latter case it was accepted that only a firm in a strong position could trade successfully in the difficult conditions prevailing.<sup>4</sup>

In 1772, following a House of Commons committee report, an Act repealing the Statute of Edward VI was passed, and by 1844 all earlier Acts were repealed, finally abolishing the diverse rules against forestallers,<sup>5</sup> ingrossers,<sup>6</sup> regrators<sup>7</sup> and badgers.<sup>8</sup> It was then considered that such Acts had effects contrary to that intended, and were partly responsible for inhibiting trade and raising prices. Monopolies *per se* have not, since this Act, been condemned in the United Kingdom, and the modern law of competition addresses the *use* of monopoly power, not its existence *per se*.

## THE MODERN REGIME

The requirements of modern legislation are different from that of the past. Whereas the conflict in the 14th to 17th centuries was largely one brought about by the creation of monopolies by the Crown, the problem by the 18th century had become that of monopolies derived from the operation of market conditions. The first significant step towards the public regulation of competition in the UK in 1948, the Monopolies and Restrictive Practices (Inquiry and Control Act) 1948, was enacted following the acceptance of a policy of full-employment by the Government and the publication of the 1944 White Paper (Cmd. 6527). This deals only peripherally with restrictive practices and monopoly control. The threat posed to government policy '[i]f, for example, the manufacturers in a particular industry were in a ring for the purpose of raising prices' was recognised (Cmd. 6527, para 51), and the pattern for post-war regulation of competition was set in para. 54:

4 This debate finds a modern counterpart in the debate on the relationship between competition and industrial policy. In 1995 the Chairman of the MMC was quoted as saying: 'Competition can be enormously beneficial in many cases, but where it involves the destruction of strong interests in a wider context, it could be weakening from UK PLC's point of view.' (HC 249-ii, p 49). Before the Select Committee Mr Odgers iterated this point: 'There is no point in us taking a view that says "local competition is of primary importance" if the result of that is to ensure that the British players are so small that they cannot compete in what is the effective market place which is the international one in which case the British components would disappear. That would be silly for us.' (HC 249-i, p 6, Q 8.) Contrast the views of White (1995): 'Antitrust is rarely, if ever, a major impediment to the international competitiveness of a firm or an industry.'

5 Forestalling was the practice of purchasing wares before they reached their designated market place in order to enhance the price, and make a profit on a later sale.

6 Ingrossing was the practise of obtaining 'other than be demise, grant, or lease of land or tithe' agricultural produce with the intention of reselling the same at a profit.

7 Regrating was an early form of arbitrage, being the practice of purchasing products in one market place to resell them in another. If the latter was within four miles of the former the practice was condemned.

8 'Badgers were travelling salesmen dealing in foods, mainly fish, butter and cheese, which they had purchased in one place for resale in another.' (Wilberforce *et al*, 1966, 138, n 36).



‘... There has in recent years been a growing tendency towards combines and towards agreements, both national and international, by which manufacturers have sought to control prices and output, to divide markets and to fix conditions of sale. Such agreements or combines do not necessarily operate against the public interest; but the power to do so is there. The Government will therefore seek power to inform themselves of the extent and effect of restrictive agreements, and of the activities of combines; and to take appropriate action to check practices which may bring advantages to sectional producing interests but work to the detriment of the country as a whole.’

Allen (1968, 63) explains the general approach of the 1948 Act, in which practices were not condemned outright, as being the result of complex political pressures:

‘Soon after the end of the war most of those who had advocated a vigorous anti-monopoly policy had left government service, and the field remained in possession of lukewarm supporters or opponents. This, together with the continuing hostility of industry, meant that there could be no question of mounting an attack on monopolies and restrictive practices on American lines.’

The Act gave the President of the Board of Trade the power to request that the newly-created Monopolies and Restrictive Practices Commission investigate situations in which either one third of goods of a given description were being produced by, or supplied to, one person or where the effect of an agreement between producers or purchasers was to give them one-third of the market. Following investigation, if it was found that the public interest was being injured, subject to the approval of Parliament, steps could be ordered, to remedy the situation. By virtue of section 11 of the Act it was established that no criminal proceedings could be brought for contravention of the Act, or orders made under section 10 of the Act. However, the Crown could bring civil proceedings for, inter alia, an injunction, in respect of the contravention of any order.

As Whish makes clear:

‘the conception of the public interest ... was extremely broad and did not accord any pre-eminence to the value of competition: indeed it did not even mention the term ... there was not even a requirement that adverse findings of the Commission had to be translated into remedial action: there was simply a power to do so’ (Whish and Sufrin, 1993, 61).

The Act did not explicitly define ‘public interest’, and the guidance given in the Act has been criticised as ‘a string of platitudes which the Commission found worthless ... [leaving it for] the members themselves to reach their own conclusions by reference to the assumptions, principles or prejudices which their training and experience caused them to apply to economic affairs’ (Allen, 1968, 61).<sup>9</sup> In each case the important factor was the circumstances in which any particular restriction operated, rather than the nature of the restriction itself. In *Standard Metal Windows and Doors* (Monopolies and Restrictive Practices Commission’s report of 8 January 1957), for instance, the operation of a common price system was found to be not acting against the public interest, whereas in *The Supply of Insulated Electric Wires and Cables* (Monopolies and Restrictive Practices Commission’s report of 25 April 1952) such practices were held to be against the public interest. Although this Act is no longer in force, having been superseded, the basic principle that commercial activities that *might* be anti-competitive will be banned only if they are *shown* to be contrary to the public interest still operates, and will continue to do so until the entry into force of the prohibitions of the 1998 Competition Act. The problems raised by the public interest

<sup>9</sup> See too the discussion of this issue in the Fifth Report of the House of Commons Trade and Industry Select Committee: ‘UK Policy on Monopolies’ (1995) HC 249, below.



test are discussed below. The position may be contrasted with that of Article 86 EC wherein activities falling within the definition of 'abuse' are condemned per se.<sup>10</sup> The 1948 Act also placed a minister, in this case the President of the Board of Control, at the pinnacle of the regulatory system.

In 1956, partly in recognition of the fact that the bulk of the Commission's work had been involved with restrictive agreements, rather than the activities of single firms, the Restrictive Trade Practices Act 1956 was enacted. To avoid overlap agreements subjected to investigation under the new Act were exempted from the application of the 1948 Act, and fell to be referred to the Registrar of Restrictive Agreements and the Restrictive Practices Court. As the effect of this was to reduce the scope of the matters referred to the Commission its chief function became that of enquiring into the scale monopolies, and most of its attention was directed to these. Allen suggests that this was, in fact a more difficult task: cartels are relatively easy to identify, although evidence may be hard to obtain, and, more importantly, it is relatively easy to calculate the effects of their operation: '[w]hen, however [the Commissioners] were confronted by monopolies of scale, [they] were not armed by any set of generally accepted principles, and obvious alternatives to the existing structure were not as a rule easy to find' (Allen, 1968, 118).

In 1965 the Monopolies and Mergers Act introduced yet further control, bringing both the service industries and mergers within the scope of the investigatory system established in 1948. This followed the White Paper on *Monopolies, Mergers and Restrictive Practices* (Cmnd. 2299) which had proposed an increase in the powers of the Monopolies Commission. Amongst other changes the Act gave the Board of Trade the power to dissolve existing monopolies on the recommendation of the Commission.

The Fair Trading Act 1973 repealed the 1948 and 1965 Acts and effected the next substantial change. Importantly this reduced the threshold at which monopoly investigations could be launched, taking the market share required down from one-third to one-quarter. The Act also created the post of Director General of Fair Trading (DGFT). The general functions of the DGFT, appointed by the Secretary of State (FTA 1973, s 1), are set out in section 2 of the Act.<sup>11</sup>

The long title of the Act again eschews talk of competition, referring instead to the 'protection of consumers'. The Fair Trading Act will be discussed in greater detail below.

In 1980 the Fair Trading Act was complemented by the Competition Act. This was in part created to meet criticisms, addressed by the Liesner Committee, that investigations under the Fair Trading Act were cumbersome and took too long. Relying upon the existing architecture, the 1980 Act, at sections 2–10,<sup>12</sup> makes provision for the control of anti-competitive practices. These are defined as

'a course of conduct which, of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it' (Competition Act 1980, s 2(1)).

The Act will be discussed in greater detail below.

<sup>10</sup> This does not preclude a discussion in each particular instance as to whether in fact the practice in issue is an abuse.

<sup>11</sup> Discussed below. The discussion and law here set out is based on the Act as it stood on 1 April 1998. Changes introduced by the Competition Act 1998 are considered briefly separately below, and discussed further in Chapter 10.

<sup>12</sup> These sections have been heavily amended by the Deregulation and Contracting Out Act 1994.



The measures directed towards the control of restrictive agreements had also been overhauled, the 1956 Act being replaced with the Restrictive Trade Practices Act 1976. This establishes a system under which agreements falling within the scope of the Act are to be registered (RTPA 1976, s 1(1)). Failure to register a registrable agreement renders the restrictions in such an agreement void (s 35(1)(a)) and

‘it is unlawful for any person party to the agreement who carries on business within the United Kingdom to give effect to, or enforce or purport to enforce, the agreement in respect of any such restrictions or information provisions’ (s 35(1)(b)).

An agreement that has been registered may be referred to the Restrictive Practices Court by the DGFT, although by virtue of s 21 the DGFT may apply to the Secretary of State for relief from the duty to refer in the circumstances set out therein. If the agreement is referred to the RPC it is for the parties either to abandon the agreement, or to justify the existence of that agreement under criteria set out in the Act. In practice defences of such agreements are extremely rare and are unlikely to succeed (Whish and Sufrin, 1993, 161–162). To a limited extent the operation of the 1976 Act has been modified by the Restrictive Trade Practices Act 1977. By virtue of a wide range of Statutory Instruments many categories of agreements have been exempted from the scope of the Acts’ application.

The Resale Prices Act 1976 is limited in scope, being addressed to a specific anti-competitive practice rather than to a form of conduct. It is unique in that it outlaws horizontal collective resale price maintenance (RPA 1976, Pt I, ss 1–8).

Various amendments have been made to the core legislation, most recently by way of the Deregulation and Contracting Out Act 1994. These amendments are dealt with as necessary when specific statutory provisions are being discussed.

### *The Fair Trading Act 1973<sup>13</sup>*

The Fair Trading Act (FTA) made significant changes to the UK’s competition regime, both by amending existing legislation and by introducing new law. The Act makes provision, inter alia, for measures to protect consumers, merger references (neither of which will be discussed here), and monopoly situations and anti-competitive practices. Part I of the Act makes provision for the general roles of the DGFT and the MMC and Part IV for specific ‘functions of the Director and Commission in relation to monopoly situations and uncompetitive practices’ (see figure 1).<sup>14</sup>

#### **FTA, Part I (ss 1–12)**

Section 1(1) of the Act provides that ‘The Secretary of State shall appoint an officer to be known as the Director General of Fair Trading’. Such appointments are for five year terms and may be renewable (s 1(2)). The first DGFT was Mr Malcolm John Methven whose appointment, at a salary of £16,000 took effect on 1 November 1973. ‘The Director has a central role in the

<sup>13</sup> The Act has been amended, most recently by the Deregulation and Contracting Out Act 1994. The discussion of the Act will take full account of all relevant amendments.

<sup>14</sup> See Figure 1, at the end of this Annex, for a diagrammatic explanation of the procedures adopted under the Fair Trading and Competition Acts (reproduced from the Fifth Report of the House of Commons Trade and Industry Select Committee: ‘UK Policy on Monopolies’ (1995) HC 249).



scheme of the Fair Trading Act and related legislation' (Cunningham, 1974, para 1-02). The general duties of the Director are set out in section 2 of the Act. Amongst other things he is to:

'keep under review the carrying on of commercial activities in the United Kingdom ... with a view to his becoming aware of, and ascertaining the circumstances relating to, practices which may adversely affect the economic interests of consumers in the United Kingdom' (s 2(1)(a)),

and:

'to keep under review the carrying on of commercial activities in the United Kingdom, and to collect information with respect to those activities, and the persons by whom they are carried on, with a view to his becoming aware of, and ascertaining the circumstances relating to, monopoly situations or uncompetitive practices' (s 2(2)).

The Director shall also take such steps as are practicable to facilitate 'his becoming aware of, and ascertaining the circumstances relating to, monopoly situations or uncompetitive practices' (s 2(2)).

The Monopolies and Mergers Commission was born out of the ashes of the Monopolies Commission, itself a reincarnation of the original Monopolies and Restrictive Practices Commission. Its new name was granted by virtue of section 4(1) of the Act. Section 4(2) set its membership at between 10 and 25 members, to be appointed by the Secretary of State. The potential membership was increased to a maximum of 50 under a Statutory Instrument enacted under the authority of section 4(3) of the Act in 1989.<sup>15</sup> Amongst other duties the MMC is required 'to investigate and report on ... (a) ... the existence, or possible existence, of a monopoly situation' (s 5(1)). The relationship between the Director and the MMC is set out in section 5(2):

- '(2) It shall be the duty of the Director, for the purpose of assisting the Commission in carrying out an investigation on a reference made to them under this Act, to give to the Commission—
- (a) any information which is in his possession and which relates to matters falling within the scope of the investigation, and which is either requested by the Commission for that purpose or is information which in his opinion it would be appropriate for that purpose to give to the Commission without any such request, and
  - (b) any other assistance which the Commission may require, and which it is within his power to give, in relation to any such matters'

Section 6 of the Act defines a 'monopoly situation in relation to supply of goods'. The words of section 7, which relates to the supply of services, mirror those of section 6, which is set out here in full.

- (1) For the purposes of this Act a monopoly situation shall be taken to exist in relation to the supply of goods of any description in the following cases, that is to say, if—
  - (a) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by one and the same person, or are supplied to one and the same person, or
  - (b) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group of interconnected bodies corporate, or are supplied to members of one and the same group of interconnected bodies corporate, or
  - (c) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group

<sup>15</sup> MMC (Increase in Membership) Order 1989, SI 1989/1240.



- consisting of two or more such persons as are mentioned in sub-section (2) of this section, or are supplied to members of one and the same group consisting of two or more such persons, or
- (d) one or more agreements are in operation, the result or collective result of which is that goods of that description are not supplied in the United Kingdom at all.
- (2) The two or more persons referred to in subsection (1) (c) of this section, in relation to goods of any description, are any two or more persons, not being a group of interconnected bodies corporate) who whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the production or supply of goods of that description, whether or not they themselves are affected by the competition and whether the competition is between persons interested as producers or suppliers or between persons interested as customers of producers or suppliers.

Section 7 contains in addition sub-section 3:

- (3) In the application of this section for the purposes of a monopoly reference, the Commission, or the person or persons making the reference, may, to such extent as the Commission, or that person or those persons, think appropriate in the circumstances, treat services as supplied in the United Kingdom if the person supplying the services—
  - (a) has a place of business in the United Kingdom, or
  - (b) controls the relevant activities from the United Kingdom, or
  - (c) being a body corporate, is incorporated under the law of Great Britain or of Northern Ireland,
 and may do so whether or not those services would otherwise be regarded as supplied in the United Kingdom.

It should be recognised that both sections 6 and 7 leave the person making the reference with an element of discretion, particularly in the terms in which the market is defined ('goods of that description'). One point of contention between those under investigation and the regulators often stems from the market definition, with the 'monopolist' arguing that the market has been drawn too narrowly.<sup>16</sup> The element of discretion is reinforced by section 10(7), which allows the person making the reference to use the criteria they 'think most suitable in the circumstances' in determining which goods may be treated as being of a 'separate description'.

Notwithstanding the wording of section 6(1)(a) and (b) a monopoly situation may be taken to exist in only a part of the United Kingdom, if it appears to the person making the reference appropriate to do so (s 9(1)). There is some debate as to the extent to which such a part of the UK has to be 'significant', and the inter-relationship between the FTA and the CA complicates matters.<sup>17</sup>

The role that political considerations play in the process is demonstrated by section 12 of the Act, which sets out the 'powers of the Secretary of State in relation to the function of the Director'. In particular the Secretary of State may indicate priorities both regarding specific matters (s 12(1)(a)) and classes of goods (s 12(1)(b)).

#### FTA, Part IV (ss 44–56G)

Section 44 sets out the power of the Director to gather information 'for the purpose of assisting him in determining whether to make a monopoly reference with respect to the existence or possible existence of that situation' (s 44(1)). The Director may 'require' any person 'to furnish

<sup>16</sup> This was a point of contention in the Classified Directory investigation considered in Chapter 6.

<sup>17</sup> See, eg HC 249, para 19.



to the Director such information as the Director may consider necessary' (s 44(2)). The penalty for not supplying information in response to a 'notice in writing served on that person' (s 46(1)) is, on conviction, a fine 'not exceeding level five on the standard scale' (s 46(2) as amended by the Criminal Justice Act 1982, ss 38, 46). The Director may then make a reference to the Commission 'where it appears to the Director that a monopoly situation exists or may exist' (s 50(1)). Following changes made by the Deregulation and Contracting Out Act 1994 (s 7) the DGFT has the power to accept an undertaking in lieu of a reference.<sup>18</sup> A reference may also be made by the Secretary of State, or any other Minister (s 51). Two types of monopoly references may be made. The simpler is a 'monopoly reference limited to the facts' (s 48).<sup>19</sup>

In dealing with such a reference the Commission is required only 'to investigate and report on the questions whether a monopoly situation exists in relation to the matters set out in the reference' (s 49). The factors that the Commission must determine are:

- '(a) by virtue of which provision of sections 6 to 8 of this Act that monopoly situation exists is taken to exist;
- (b) in favour of what person or persons that monopoly situation exists;
- (c) whether any steps (by way of uncompetitive practices or otherwise) are being taken by that person or those persons for the purpose of exploiting or maintaining the monopoly situation and, if so, by what uncompetitive practices or in what other way; and
- (d) whether any action or omission on the part of that person or those persons is attributable to the existence of the monopoly situation and, if so, what action or omission and in what way it is so attributable;
- ...

Under a wider remit the Commission can be asked to consider references not limited to the facts (s 49). As this is an important section, the consideration of which is a vital part of this work the section is set out in full.

**'49. Monopoly reference not limited to the facts**

- (1) A monopoly reference may be so framed as to require the Commission to investigate and report on the question whether a monopoly situation exists in relation to the matters set out in the reference in accordance with section 47 of this Act and, if so, to investigate and report—
  - (a) on the questions mentioned in paragraphs (a) to (d) of section 48 of this Act and
  - (b) on the question whether any facts found by the Commission in pursuance of their investigations under the preceding provisions of this subsection operate, or may be expected to operate, against the public interest.<sup>20</sup>
- (2) A monopoly reference may be so framed as to require the Commission to investigate and report on the questions whether a monopoly situation exists in relation to the matters set out in the reference in accordance with section 47 of this Act and, if so,—
  - (a) by virtue of which provisions of sections 6 to 8 of this Act that monopoly situation is to be taken to exist;
  - (b) in favour of what person or persons that monopoly situation exists; and
  - (c) whether any action or omission on the part of that person or those persons in respect of matters specified in the reference for the purposes of this paragraph operates, or may be expected to operate, against the public interest.
- (3) For the purposes of subsection (2)(c) of this section any matter may be specified in a monopoly reference if it relates to any of the following, that is to say—
  - (a) prices charged, or proposed to be charged, for goods or services of the description specified in the reference;

<sup>18</sup> This situation is considered further in Chapter 7.

<sup>19</sup> The Commencement Order for both types of reference took effect on 1 November 1973, SI 1973/1652.

<sup>20</sup> 'Public interest' is dealt with in section 84.



- (b) any recommendation or suggestion made as to such prices;
- (c) any refusal to supply goods or services of the description specified in the reference;
- (d) any preference given to any person (whether by way of discrimination in respect of prices or in respect of priority of supply or otherwise) in relation to the supply of goods or services of that description;

and any matter not falling within any of the preceding paragraphs may be specified for those purposes in a monopoly reference if, in the opinion of the person or persons making the reference, it is of a kind such that (if a monopoly situation is found to exist) that matter might reasonably be regarded as a step taken for the purpose of exploiting or maintaining that situation or as being attributable to the existence of that situation.

...

Whenever the Director intends to exercise his power in making a reference a copy of that reference must be submitted to the Secretary of State. The Minister then has fourteen days in which he may direct the Commission not to proceed with the reference (s 50(6)). Once made any monopoly reference may be varied by the person who made that reference (s 52(1)), although not in such a way as to turn the reference into one that that person would not have been able to make originally (s 52(3)). Neither may a monopoly reference not limited to the facts be varied so as become a reference limited to the facts (s 51(2)). References shall be published in the Gazette,<sup>21</sup> and shall also be published in such a way as is 'most suitable for bringing it to the attention of persons who ... would be affected by it' (s 53(1)).<sup>22</sup>

The duties of the MMC with respect to the report requested by the reference are set out in section 54. Amongst other things the Commission is required to set out 'definite conclusions on the questions comprised in the reference' (s 54(2)). The responsibilities of the Commission when reporting on a reference not limited to the facts are set out at section 54(3):

- '(3) Where, on a monopoly reference not limited to the facts, the Commission find that a monopoly situation exists and that facts found by the Commission in pursuance of their investigations . . . operate, or may be expected to operate, against the public interest, the report shall specify those facts, and the conclusions to be included in the report, in so far as they relate to the operation of those facts, shall specify the particular effects, adverse to the public interest, which in their opinion those facts have or may be expected to have; and the Commission—
  - (a) shall, as part of their investigations, consider what action (if any) should be taken for the purpose of remedying or preventing those adverse effects, and
  - (b) may, if they think fit, include in their report recommendations as to such action.'

The 'action' referred to in section 54(3)(a) is that which may be taken either by those in whose favour the monopoly exists, or by the relevant Minister(s) (s 54(4)(a), (b)). There is no time limit set in the Act within which Commission reports must be completed following the making of the reference, but section 55 provides that a time period must be specified in the reference itself. This may, subsequently, be extended (s 55(2)).

#### FTA, Part VII (ss 81–83)

In addition to its section 54 duties the Commission is required to

'take into consideration any representations made to [it] by persons appearing to [it] to have a substantial interest in the subject-matter of the reference, or by bodies

<sup>21</sup> By virtue of s 53(4) 'any reference to publication in the Gazette is a reference to publication in the London Gazette, the Edinburgh Gazette or the Belfast Gazette, whichever first occurs.'

<sup>22</sup> I.e., in relevant trade journals, the local press etc. Some examples are given in Chapter 5.



appearing to [it] to represent substantial numbers of persons who have such an interest' (s 81(1)(a)).<sup>23</sup>

Subject to these constraints on its role the Commission has the discretion to 'determine [its] own procedure for carrying out any investigation on a reference under [the Act]' (s 81(2)), although it must have regard to such general directions as may be issued from time to time by the Secretary of State (s 81(3)).

Reports are addressed to the relevant minister, and it is for the minister to 'lay a copy of the report before each House of Parliament, and ... arrange for the report to be published in such a manner as appears to the Minister or Ministers to be appropriate' (s 83(1)). A copy of every report shall also be sent to the DGFT (s 86). There are several provisions made to ensure that matters which are confidential, or whose disclosure would be contrary to the public interest, are not disclosed. Following a report the minister may make an order by way of statutory instrument exercising one of the powers conferred by Schedule 8 to the Act (s 56(2)). The power of the Minister to make orders, and the circumstances in which they may be made, are discussed in greater detail below.

#### FTA, Part VIII (ss 84–93B)

The 'additional provisions' set out in Part VIII of the Act are of a largely procedural nature. However, section 84 is of fundamental importance in the context of section 49 references. Section 84 provides as follows:

- '(1) In determining for any purposes to which this section applies whether any particular matter operates, or may be expected to operate, against the public interest, the Commission shall take into account all matters which appear to them in the particular circumstances to be relevant and, among other things, shall have regard to the desirability—
- (a) of maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom;
  - (b) of promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied;
  - (c) of promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets;
  - (d) of maintaining and promoting the balanced distribution of industry and employment in the United Kingdom; and
  - (e) of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods, and of suppliers of goods and services, in the United Kingdom.'

It is clear from the wording of subsection (1) that the list of matters that may be relevant is not intended to be exhaustive, and it is in the discussion of the nature of the public interest that much of the investigative time is taken up. The central role that the public interest has in the work of the MMC is made clear in its Annual Reviews.<sup>24</sup>

In order to facilitate its investigations the Commission has been given the power to require persons to give evidence to the Commission (s 85(1)(a)); to require the production of documents 'relating to any matter relevant to the investigation' (s 85(1)(b)); and to require 'such estimates,

<sup>23</sup> The extent to which third parties falling within this section have effective access to the procedure is considered in Chapters 5–7 and further in Chapter 10.

<sup>24</sup> 'The focus of the Monopolies and Mergers Commission's work is the public interest' (MMC, 1995a). The 1993 Annual Review was entitled 'Focusing on the Public Interest' (MMC, 1994a).



returns or other information as may be specified' (s 85(1)(c)). Evidence given before the Commission may be on oath (s 85(2)), and 'any person who ... wilfully alters, suppresses or destroys any document which he has been required ... to produce ... shall be guilty of an offence' (s 85(6)). The penalty on conviction may be either a fine, or, in the case of conviction on indictment, a term of imprisonment not exceeding two years (s 85(6)(b)).

A standard approach is taken to all investigations. The MMC first acquaints itself with the market, often by way of site visits and informal contacts with those involved in the industry. At the same time it develops a factual questionnaire that firms are first asked to comment on in draft, and that is then sent to the more significant parties for completion. As part of its fact finding the MMC is also likely to conduct surveys of smaller participants in the industry, major customers, consumer groups, and industry representatives.

Following the submission of the responses to the questionnaires the MMC will in most cases hold a clarification, or factual, hearing, to resolve matters about which it is still uncertain. Following the factual hearing, if one is held, the MMC will send the parties a 'public interest letter'. This will state first whether a monopoly situation has been found to exist on the basis of the facts available to the MMC. If there is no monopoly situation the MMC does not have the jurisdiction to even consider the public interest matters, and will normally expedite proceedings at this stage. If a monopoly situation does exist the MMC will raise any concerns that it may have regarding public interest issues, and its initial views as to the possible remedies where it has identified harms. Following the responses to the letter further 'public interest' hearings with the main parties will be held to discuss the issues arising, and in some cases yet a third hearing, to discuss remedies, will take place.

The MMC will then produce a draft report, and details relevant to each of the parties only will be sent to that party for comment.<sup>25</sup> The involvement of the MMC will come to an end when the report is made to the Secretary of State, whose role in the process is set out above.

As well as being directed to the Minister the DGFT shall be sent a copy of every report (s 86) save where the reference was made by a Minister in a circumstance where the DGFT could not have made the reference (s 86(2)). The Director then may choose to give advice to the relevant Minister regarding any matter arising out of the report, which the Minister is obliged to take into account. Where the Minister decides that action is required following the receipt of the report it is the duty of the DGFT 'to comply with any request of the [Minister] to consult with ... the relevant parties with a view to obtaining from them undertakings to take action' (s 88(1)). The Director shall notify the Minister of any such undertakings and these shall be published in an appropriate manner (s 88(2), (2A)). Once an undertaking has been given the Director has an ongoing duty to monitor compliance with that undertaking, and the extent to which the undertaking remains appropriate given in changing economic circumstances (s 88(3)).

Where the Minister considers that an order in Parliament is more appropriate to the remedying of any situation than would be the making of an undertaking by the relevant parties he may make use of his powers under section 56. The operation of this power is proscribed by sections 90 and 91, which should be read in conjunction with Schedule 8. By virtue of section 89 the Minister may make an interim order after receipt of the report if the Minister intends to make a 'principal order' the effect of which might be obstructed by continuing anti-competitive activities. In making an order the Minister must lay a draft of the order before Parliament, and can only act when the approval of Parliament has been obtained (s 91(1)). The Minister shall also, in an

<sup>25</sup> Material may be excluded from the published report at the discretion of the Minister (s 83, FTA) and companies are keen at this stage to identify those matters which they do not want made public.



appropriate manner, publish his intention to make the order and shall accept representations made relating to that order before the order is made (s 91(2)). Once an order is made any subsequent breach does not give rise to criminal sanctions. However, third parties may bring civil proceedings in respect of a breach and the Crown may seek an injunction or 'any other appropriate relief' (s 93).

### *The Competition Act 1980*

'[T]he Competition Act allows the investigation of particular practices of individual firms which restrict, distort, or prevent competition, and such an investigation is normally completed more quickly than a Fair Trading Act reference. No specific anti-competitive practice is prohibited and the Act does not specify any which are undesirable. Instead its approach is flexible, allowing each practice to be investigated individually with consideration being given to all the circumstances that may be relevant to the particular case' (OFT, 1993b, 5).

In the second Liesner Report (Cmnd. 7512) the Committee devoted chapter 6 to anti-competitive practices. It was recognised that whilst it was necessary to control such practices, which are assumed have the ability to harm the market significantly only when carried on by a dominant firm, they would not always be caught by existing legislation. In particular 'this dominant position is not necessarily based on monopoly conditions that could readily be brought within the definition of the Fair Trading Act' (Cmnd. 7512, para 6.7). The Committee concluded that:

'Control of these practices therefore must be general in scope rather than limited to practices defined in the legislation and should turn solely on whether a practice has anti-competitive effects' (Cmnd. 7512, para 6.13).

At para 7.33 of the Report the Committee recommended that, for the reasons it discussed:

'the essentials are a power to investigate particular cases of restriction of competition through the use of these practices in order to determine whether there were other offsetting benefits and whether on balance the practice operated against the public interest in the particular case; and a power, following such investigation, to stop the use of the practice in the particular case. The scope of the powers would need to be delimited in the legislation and, to avoid the problem of trying to define the numerous varieties of restriction, the definition could simply take the form of a reference to practices ... which have as their purpose or effect the restriction, distortion or prevention of competition.'

This recommendation became, in essence, the Competition Act 1980.

Section 2 of the Act provides a definition of anti-competitive conduct that is remarkably similar to that of the Liesner Committee (itself, an adoption of the tenor of Article 85(1) EC). The Act provides that:

'a person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct which, of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it' (s 2(1)).

Whilst the Act does not require that any specific market share be reached before a breach can occur section 2(3) allows for the exclusion from the ambit of the Act of practices if an order is



made to that effect by the Secretary of State. In particular 'any such order may limit the exclusion conferred by it by reference to a particular class of persons or to particular circumstances'. Thus the Secretary of State has used this power to make orders setting thresholds at which the Act will operate.<sup>26</sup>

Where it is suspected that an anti-competitive course of conduct is being pursued the Director has the right to carry out an investigation 'with a view to establishing whether that person has been or is pursuing a course of conduct which does amount to such a practice' (s 3(1)).<sup>27</sup> The powers of the DGFT to gather information mirror those of the Commission under the Fair Trading Act (s 1(7), (8)). The Director is, by virtue of section 4 of the Act, able to accept an undertaking offered where that undertaking 'would remedy or prevent effects adverse to the public interest which the practice may now or in future have' (s 4(1)(c)). Such an undertaking may be accepted only after the Director 'has (a) arranged for the publication of an appropriate notice, and (b) considered any representation made to him in accordance with the notice' (s 4(2)). The Director does not have to conduct a section 3 investigation prior to accepting an undertaking.

The Director may, by powers granted under section 5, make a reference to the MMC where:

- '(a) There are reasonable grounds for believing that any person is pursuing or has pursued a course of conduct which constitutes an anti-competitive practice' (s 5(1)(a)).

Prior to the enactment of the Deregulation and Contracting Out Act 1994 the Director could make a reference to the MMC only where he had already carried out an investigation under section 3 of the Competition Act. The 1994 Annual Report therefore makes it clear that:

'[t]he report on the investigation into bus services in Darlington (due to be published in early 1995) will therefore be the last report published by the Director General under this statute. The total of such reports produced since the Act was passed in 1980 will then be 36' (OFT, 1995a, 34).<sup>28</sup>

It would appear from this that, although the Director General retains the power to make reports under section 3, this power has in practice fallen into abeyance. In practice therefore the Competition Act regime now appears very similar to that of the FTA, save that the terms of the reference are limited, and there is no need to establish the existence of a scale or complex monopoly.

In examining a competition reference

- 'the Commission shall investigate and report on the following questions, namely—
  - (a) whether any person subject to the reference was at any time during the period of twelve months ending on the date of reference pursuing, in relation to goods or services specified in the reference, a course of conduct so specified or any other course of conduct which appears to be similar in form and effect to the one so specified; and
  - (b) whether, by pursuing any such course of conduct, a person subject to the reference was at any time during that period engaging in an anti-competitive practice; and

<sup>26</sup> Currently the limit is set by the Anti-Competitive Practices (Exclusions) (Amendment) Order 1994 (SI 1994/1557) which entered into force on 14 August 1994. The position now is that any person whose annual turnover is less than £10 million, or who has less than one quarter of the relevant market, and who is not a member of a corporate group with an aggregate annual turnover of £10 million or more or one quarter of the relevant market, is excluded from the scope of the CA 1980.

<sup>27</sup> It should be noted that this section has been heavily amended by the Deregulation and Contracting Out Act 1994.

<sup>28</sup> This report forms the basis of the Chapter 5 case study.



- (c) whether, if any person was so engaging in an anti-competitive practice, the practice operated or might be expected to operate against the public interest' (s 5).

The Director may, however, exclude certain matters from the scope of the reference. The Secretary of State, to whom copies of all references made by the Director must be sent, has the power to direct the Commission not to proceed with a reference (s 7(2)). This power has been used only once, in February 1994 when the Secretary of State, Neil Hamilton, blocked a proposed reference into the conduct of Arran Transport and Trading Company Ltd. The Commission's investigative powers are those of the FTA, ss 84 and 85.

Reports of references are made to the Secretary of State (s 8(1)), and the report is required to state the conclusions of the Commission regarding the matters set out in section 5 (above). If the Commission concludes that anti-competitive conduct, injurious to the public interest, is being pursued the Commission:

- '(a) shall, as part of their investigations, consider what action (if any) should be taken for the purpose of remedying or preventing the adverse effects of that practice; and
- (b) may, if they think fit, include in their report recommendations as to such action including, where appropriate, action by one or more Ministers (including Northern Ireland departments) or other public authorities' (s 8(4)).

As well as being sent to the Minister any reports completed under the Competition Act will also be sent to the DGFT, whose recommendations, if any, are to be considered by the Minister (s 8(5)).

Anti-competitive conduct identified by the investigation may be rectified either by way of an undertaking negotiated by the DGFT under section 9, or by way of an order in Parliament made by the Secretary of State under section 10. These order-making powers are those of the FTA.

### *Criticisms of the Acts*

In his 1994 Annual Report Sir Bryan Carsberg, then DGFT, wrote that: 'I would not advocate the complete abandonment of the monopoly provisions of the Fair Trading Act' (OFT, 1995a, 8). He did, however, advocate significant changes, the primary effect of which would be to introduce a prohibition system of competition enforcement in relation to 'certain ... kinds of behaviour which amount to an abuse of a dominant position' (OFT, 1995a, 8). Sir Gordon Borrie, DGFT 1976–1992, has also stated that it is likely, and desirable, that the UK move to a prohibition system, whilst supporting the *ad hoc* investigation of particular product markets (Lonbay, 1994, 32). The problems with the present regime were set out in the 1992 Green Paper (Cm. 2100). This highlighted the lack of deterrence in the operation of the regime:

'The case-by-case, public interest assessment under current UK legislation, and the absence of a prohibition on abuse of market power, mean that nothing is itself unlawful' (Cm. 2100, para 2.13).

The case-by-case approach also means that the same conduct, although not in the same circumstances, is repeatedly investigated, and that inconsistencies are a feature of the system.<sup>29</sup> In each case the conduct is permitted, even if it has been prohibited after earlier investigations, until again prohibited. It follows therefore that the current system is 'lengthy and costly in terms

<sup>29</sup> See, e.g. the evidence given by the Consumers' Association, HC 249–ii, 48, para 4(a).



of management time and professional fees. ... The cost, therefore to British industry of the case by case approach is very considerable.' (Lonbay, 1994, 59). In the first Liesner report (Cmnd. 7198) concern was expressed about the length of time taken by the MMC in compiling its reports. The average length of time taken was found to be between 18 months and two years. Whilst the process was becoming less slow the fact remained that 'a monopoly investigation is still a lengthy process during which the circumstances in an industry may change significantly' (Cmnd. 7198, para 4.23). It was argued that industry felt obliged to be represented by lawyers at the MMC proceedings which took on a quasi-judicial character, and that, at the same time, felt less urgency to co-operate with monopoly investigations, where the best that could be hoped for was a conclusion to the effect that the status quo could be maintained, than was the case with merger references (Cmnd. 7198, para 4.23).

The Green Paper is also concerned that the MMC does not have the power to establish 'whether there is a *prima facie* case of abuse', although the Commission does have adequate powers to investigate once a formal reference has been made (Cm. 2100, para 2.15).

The most extensive single discussion of the inadequacies of the regime can now be found in the Fifth Report of the House of Commons Trade and Industry Select Committee: 'UK Policy on Monopolies'. The size of the task facing the Committee was hinted at in the argument made by the Consumers' Association that:

'British competition policy ... is now ripe for a searching review. ... This should cover not only experiences with recent reports from the [MMC], but also the nature of the institutions responsible for competition policy, the basic rules these bodies apply, the effectiveness of the remedies proposed, and the degree of consistency across the system' (HC 249-II, 43, para 1).

Published over six volumes HC 249 included 135 pages of minutes of evidence and 34 pages of memoranda. The Report itself runs to 41 pages, and concludes, amongst other recommendations that:

'a prohibition approach would increase the deterrent effect of UK monopoly law, give greater rights to third parties and reduce the burden on businesses in some respects by giving the opportunity of aligning UK and EC law and by reducing the scope for long MMC investigations' (HC 249-I, lvi, para 10).

Particular attention was paid to the operation of the public interest test. The Consumer's Association argued that the 'unacceptably loose definition of the public interest' (HC 249-ii, 49, para 5)<sup>30</sup> is one of the two problems 'at the heart of the current set up'. At point 20 of its report the Committee noted that the definition of 'public interest' caused problems:

'The DGFT defined the public interest as "consumer well-being" but admitted that "I do not think anybody could possibly pretend that they could sit down and do some sums and have an answer they can defend against all comers at the end of the day". The Chairman of the MMC said that it was impossible to define the public

<sup>30</sup> It is worth reproducing the main criticism in full: 'There is a fair amount of confusion behind the way these concepts [the five criteria set out in the Act] are thrown together. The first implies that competition is a desirable end in itself; the remaining four suggest that this is only the case if particular ends — that is in relation to consumers, innovation and productivity improvement, employment and exports — are being met. Some of the individual items are inherently unclear. For example, "balanced distribution" could mean almost anything. And most important of all, it will be quite wrong to imply that the interests of consumers, productivity improvements, exports and so on are inherently equal. They are not. Ultimately all production should serve the interests of consumers, and all the other elements are arguably subsidiary in the long term. Still more disturbing, it is far from clear how this balance of public interest is to be achieved in practice. Yet this is a crucially important process given the scope for conflict and misunderstanding which exists.'



interest in a general context, and the Minister simply referred to the criteria set out in the Act. These criteria, however, are extremely broad and lack an indication of priorities' (HC 249–I, xiii, fn references excluded).

The Committee felt that a consequence of the definition problem was that of a perceived inconsistency and unpredictability in MMC investigations, and that 'the concerns about inconsistency merit general policy statements', but that it would, in the present structure, be inappropriate for the MMC to issue such guidance (HC 249–I, xxii, point 46). The MMC, in its evidence to the Select Committee, made no comment on the words of the Act directly. However, both in the memorandum submitted by the MMC and in verbal evidence before the Committee the point was raised. In the memorandum the MMC stated that it applies 'no set formula for balancing the various statutory criteria [and that] [i]t would be unlawful for the MMC to adopt an inflexible policy in assessing the public interest' (HC 249–I, 1, para 1.3). Asked by the Committee to define 'public interest' Mr Odgers replied: 'I think it is impossible to do that within [a] general context ... it all depends – and this is the very essence of our work – we have to look at particularities of circumstances' (HC 249–I, 8, Q18).

## REFORM, AND THE COMPETITION ACT 1998

It is not appropriate to discuss the Competition Act 1998 in full here, and many books will be published dealing with the Act following the grant of Royal Assent in November 1998. Changes to procedure that are particularly relevant to this work are considered in part in Chapter 10, above.

In August 1996, during the final term of the Conservative Government, the DTI published its Draft Competition Bill (DTI, 1996b), following a consultation exercise based on a document published in March of that year (DTI, 1996a). The focus of the Bill was on multi-lateral anti-competitive conduct, and clause 1 would have repealed the RTPAs 1976 and 1977, the Resale Prices Act 1976 and the Restrictive Practices Court Act 1976. The government intended, the explanatory document said, 'to introduce a prohibition of anti-competitive agreements' (DTI, 1996b, para 11).<sup>31</sup> The structure of the FTA and the CA would have been left largely intact under the provisions of the Bill, although two significant changes were set out. Section 44 of the FTA is amended to give the DGFT far stronger powers of investigation,<sup>32</sup> and a new section 56H gives the Director the power to impose interim measures where necessary to 'avoid an immediate risk of serious, irreparable damage' or 'as a matter of urgency in the public interest'. While these proposals were generally welcomed, some parties expressed concern that the proposals were not being taken further. The National Consumer Council, for example, remained 'of the

31 See further cl 2(1) which set out the general prohibition in language similar to that of art 85 EC, and for a general discussion of the Bill see Furse (1996).

32 In particular the following is inserted:

'(3) In the circumstances and for the purpose mentioned in subsection (1) above the Director may:

- (a) require any person within subsection (4) below to produce to the Director, at a specified time and place, any specified documents which are in his custody or under his control and which are relevant;
- (b) require any person within subsection (4) below who is carrying on a business to give the Director specified estimates, returns, or other information, and specify the time at which and the form and manner in which the estimates, returns or information are to be given;
- (c) enter any premises used by a person within subsection (4) below for business purposes, and:
  - (i) search for documents which are relevant;
  - (ii) require any person on the premises to produce any documents on the premises which are in his custody or under his control which are relevant;
  - (iii) require any person on the premises who carries on business there to give the Director such information as he may require. ...'



view that a move to a prohibition system, along the lines of Article 86, would provide a much more effective way of rooting out anti-competitive behaviour' (National Consumer Council, 1996, 24). The Consumers' Association too argued that 'the UK needs to move to an Article 86 style prohibition of abuse of market power' finding 'the arguments made against this in the consultation document singularly unconvincing' (Consumers' Association, 1996, 17). The recognised that 'it was clear from the consultation that the Government's view that current legislation has significant shortcomings and that these need to be put right at the earliest legislative opportunity was widely shared' (DTI, 1996b, para 47), but preferred to put the issue to one side to be reviewed at a later date following further consultation.

In the Queen's Speech of 14 May 1997, the first under the new Labour administration, it was announced that in the forthcoming parliamentary session the government would honour the commitment made in its manifesto to reform the system of competition law, as part of a wider 'industrial and trade policy aimed at boosting Britain's international competitiveness' (Labour Party, 1997, 50). It was made clear at that time that the proposals that would be brought forward would be more radical than those envisaged in the 1996 draft bill, and would lead to a complete overhaul of the domestic system of competition law.

At the heart of the Act, the draft Bill of which was published in August 1997, are two prohibitions.<sup>33</sup> The Chapter I prohibition (cl 2) applying to anti-competitive agreements and the Chapter II prohibition (cl 18) to abuse of dominant position. The Government has made clear on many occasions its desire to align national law with that of the European Community.<sup>34</sup>

Although s 17 of the Act repeals those parts of the Competition Act 1980 dealing with anti-competitive conduct the provisions of the Fair Trading Act relating to both scale and complex monopoly investigations are, somewhat controversially, left intact, although as discussed in the concluding chapter scale monopoly investigations will proceed only where a prior finding of a breach of the Chapter II prohibition has been made. Institutional adjustments notwithstanding the process of investigation considered in this work remains pertinent to the 'new' regime, which will not in any case be applied until 1 March 2000 (the 'starting date'). The scale monopoly provisions will not, however, be invoked until such time as there has been a prior finding of a breach of the Chapter II prohibition. The extent to which the research reported here is appropriate to the new regime, and the ramifications of the new regime on the investigative process, are considered further in Chapter 10.

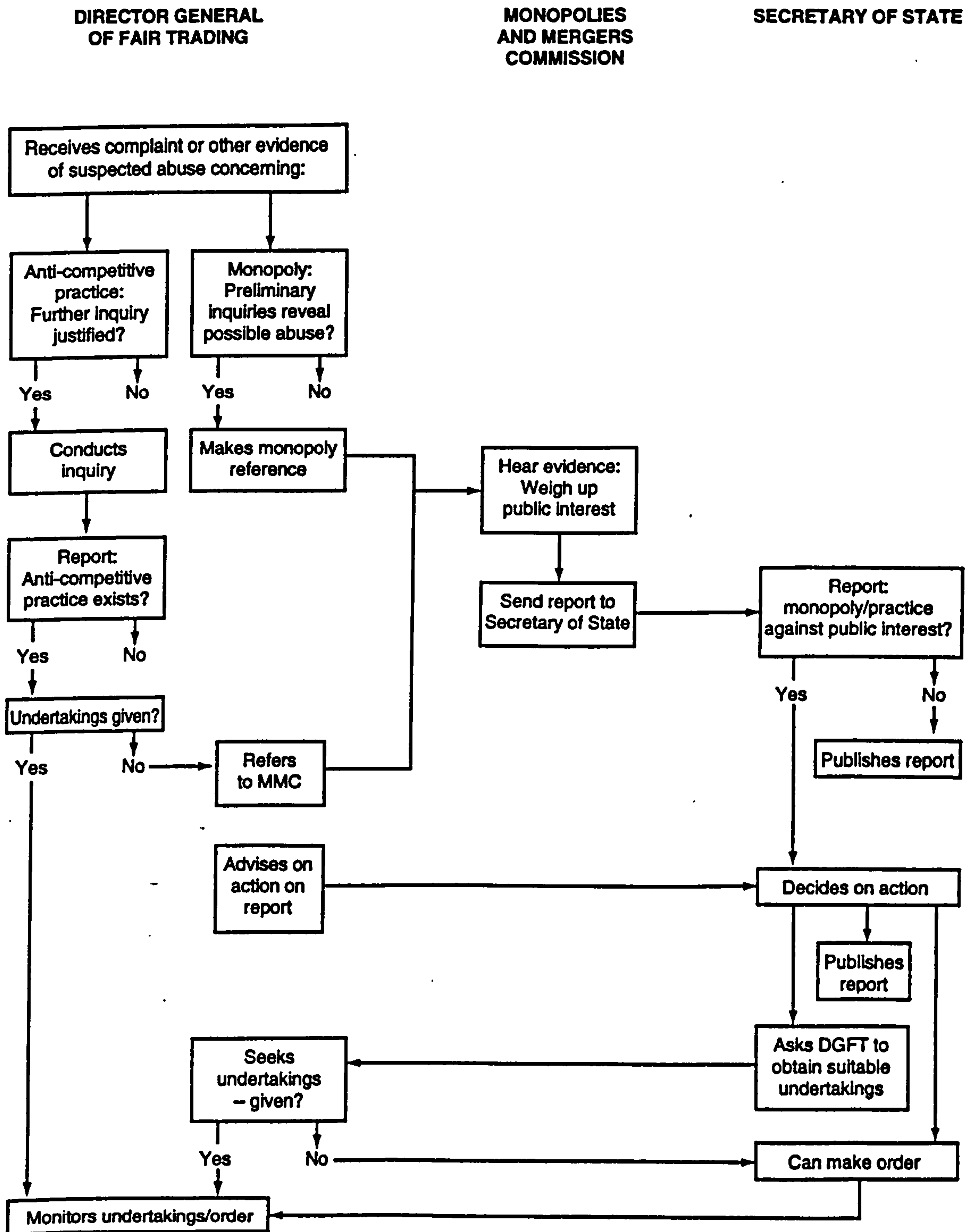
<sup>33</sup> For comment on the draft see Furse (1997, 1998), and Scholes (1998).

<sup>34</sup> Thus, for example, Lord Haskel: 'I cannot overemphasise that the purpose of the Bill is to ensure as far as possible a consistency with EC approach and thereby to ease burdens for business' (1997) Hansard (HL) 17 November, col 417.



FIGURE 1

## Procedures under the Fair Trading Act and Competition Act





# Bibliography

## BOOKS, ARTICLES AND MEDIA

- Addy, G. N. 1993. 'The Bureau of Competition Policy's Compliance Approach', *McGill Law Review*, 38, 867-881
- Adler, H. 1990. 'Antitrust Quiz: an aid to Effective Corporate Compliance', *Corporate Counsel's Quarterly*, 6, 169-177
- Airtours. 1996. *Annual Report*
- Allen, G. C. 1968. *Monopoly and Restrictive Practices*, London, George Allen & Unwin Ltd
- American Bar Association 1995. *Antitrust Compliance Manuals: A Compendium of State-of-the-Art Manuals for Today's Corporations*, Chicago, American Bar Association
- 1997a. *New Antitrust Remedies: When and How to Settle a Case with the Antitrust Agencies*, Chicago, American Bar Association
- 1997b. *New Horizons in Liability: Antitrust Litigation in the State Courts*, Chicago, American Bar Association
- Anderson, L. C. 1995. 'United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review', *Antitrust Law Journal*, 65, 1-40
- Areeda, P. 1990. 'Essential Facilities: an epithet in need of limiting principles', *Antitrust Law Journal*, 58, 841-853
- Atkinson, D. 1995. 'MMC Checks Yellow Pages for "Abuse"', *The Guardian*, 2 March
- BBC. 1995. 'File on Four: Competition Law Reform' (Radio Broadcast, 26/5/1995)
- Bain, J. S. 1956. *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries*, Cambridge, MA, Harvard University Press
- Bardach, E. and Kagan, R. A. 1981. *Going by the Book: The Problem of Regulatory Unreasonableness*, Philadelphia, Temple University Press
- Baumol, W. J. and Ordover, J. A. 1985. 'Use of Antitrust to Subvert Competition', *Journal of Law and Economics*, XXVIII, 247-270
- Beckenstein, A. R. and Gable, H. L. 1982. 'Antitrust Compliance: Results of a Survey of Legal Opinion', *Antitrust Law Journal*, 51, 459-516
- Bergson, A. 1973. 'On Monopoly Welfare Losses', *American Economic Review*, 63, 853-870
- Bork, R. H. 1993 (rev'd edn). *The Antitrust Paradox: A Policy at War with itself*, New York, The Free Press
- Borrie, G. 1994. 'The Regulation of Public and Private Power', *Public Law* 552-567



- Bouterse, R. B. 1994 *Competition and Integration – What Goals Count?*, Deventer (The Netherlands), Kluwer
- Branfman, E. J. 1982. 'Antitrust Consent Decrees: A Review and Evaluation of the First Seven Years Under the Antitrust Procedures and Penalties Act', *Antitrust Bulletin*, 27, 303–354
- Breit, W. and Elzinga, K. G. 1974. 'Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages', *Journal of Law and Economics*, 17, 329–356
- Brent, R. 1993. 'The Meaning of "Complex Monopoly"', *Modern Law Review*, 56, 812–831
- Broadway, R. W. 1974. 'The Welfare Foundations of Cost Benefit Analysis', *The Economic Journal*, 84, 926–939
- Buchanan, J.M. 1980. 'Rent Seeking and Profit Seeking', in Buchanan, J.M., Tollison, R.D. and Tullock, G. (eds) 1980. *Toward a Theory of the Rent Seeking Society*, Texas A&M University Press
- Burton, J. (1994) 'Bus wars: irresistible force meets the immovable object', *Northern Echo*, 16 June
- Clark, J. M. 1940. 'Towards a Theory of Workable Competition', *American Economic Review*, 30, 241–256
- Clark, M. 1996. 'Airtours Heading into more Profitable Waters', *The Times*, 9 December
- Comegys, W. B. 1987. *Antitrust Compliance Manual: A Guide for Counsel and Executives of Businesses and Professions (2nd edn)*, New York, Practising Law Institute
- Conklin, J. E. 1977. *Illegal But Not Criminal*, Englewood Cliffs NJ, Prentice Hall
- Consumers' Association. 1996. *Consumers' Association Response to the Department of Trade and Industry's Consultation Document 'Tackling Cartels and the Abuse of Market Power'*, London, Consumers' Association
- Cowling, K. and Mueller, D. C. 1978. 'The Social Costs of Monopoly Power', *Economic Journal*, 88, 727–748
- 1981. 'The Social Costs of Monopoly Power Revisited', *Economic Journal*, 91, 721–725
- Cunningham, J. P. 1974. *The Fair Trading Act 1973: Consumer Protection and Competition Law*, London, Sweet and Maxwell
- Curphey, M. 1996a. 'Travel Firms Escape MMC Investigation', *The Times*, 1 July
- 1996b. 'OFT Split over Travel Operators Inquiry', *The Times*, 26 August
- 1996c. 'Concern over Holiday Inquiry Report', *The Times*, 16 October
- 1996d. 'Future of Thomson Tour Arm on Hold Until MMC Reports', *The Times*, 11 November
- 1996e. 'Airtours Gears up for Travel Inquiry', *The Times*, 12 December
- Demsetz, et al. 1991. 'Policy Adequacy of the Empirical Concentration Price Studies: The Posner Lament', *Antitrust Law and Economics Review*, 19–63
- Department of Justice. 1987. *Internal Guidelines*, Washington, DOJ
- Department of Trade and Industry and Office of Fair Trading. 1993. *Consultation Exercise on Possible Changes to Competition Legislation and Procedures to Reduce the Burden on Business – Report by the DTI and OFT*, London, DTI
- Department of Trade and Industry. 1996a. 'Tackling Cartels and the Abuse of Market Power: Implementing the Government's Proposals for Legislative Reform – A Consultation Document', London, DTI



- 1996b. 'Tackling Cartels and the Abuse of Market Power: a Draft Bill – an Explanatory Document', London, DTI
- 1997a. 'A Prohibition Approach to Anti-Competitive Agreements and Abuse of Dominant Position: Draft Bill', London, DTI
- 1997b. 'United Kingdom's Response to the European Commission's Green Paper on Vertical Restraints (Draft)', London, DTI
- Dobson, P. W. and Waterson, M. 1996. *Vertical Restraints and Competition Policy (OFT Research Paper 12)*, London, Office of Fair Trading
- Diamond, P. A. and McFadden, P. L. 1974. 'Some Uses of the Expenditure Function in Public Finance', *Journal of Public Economics*, 3, 1–21
- Eadie, A. 1995. 'Yellow Pages Referred to MMC'. *The Electronic Telegraph*, 2 March
- Eckard, E. W. 1988. 'Advertising, Concentration Changes, and Consumer Welfare', *Review of Economics and Statistics*, 70, 340–343
- Elliott, H. 1996. 'Travel Firms Insist Big is Better for the Customer', 8 November
- Elzinga, K.G. and Breit, W. 1976. *The Antitrust Penalties*, New Haven, Yale University Press
- Ermann, M. D. and Lundman, R. J. (eds) 1978. *Corporate and Governmental Deviance: Problems of Organizational Behaviour in Contemporary Society*, Oxford, Oxford University Press
- Ernst & Young. 1993. *Competition Inquiries: A New Approach – Recommended changes to procedures for dealing with Monopoly and Merger Inquiries*, London, DTI
- European Commission, 1972. *Report on Competition Policy 1972*, Luxembourg, Office for Official Publications of the European Community
- 1980. *Ninth Report on Competition Policy 1979*, Luxembourg, Office for Official Publications of the European Community
- 1994. *XXIIIrd Report on Competition Policy 1993*, Luxembourg, Office for Official Publications of the European Community
- 1997. *Green Paper on Vertical Restraints in EC Competition Policy*, Com(96) 721 final, Luxembourg, Office for Official Publications of the European Community
- Farrell, S., Bale, J., and Durman, P. 1996. 'Fair Trading Inquiry Into Holiday Firms', *The Times*, 8 November
- Federal Trade Commission. 1997. *Anticipating the 21<sup>st</sup> Century*, Washington, Federal Trade Commission
- First, H. 1995. 'Is Antitrust Law?' *Antitrust*, Fall, 9–12
- Frazer, T. 1990. 'Competition Policy after 1992: The Next Step', *Modern Law Review*, 53, 609–623
- 1995. 'Monopoly, Prohibition and Deterrence', *Modern Law Review*, 58, 846–859
- Frazer, T. and Waterson, M. 1994. *Competition Law and Policy: Cases, Materials and Commentary*, Hemel Hempstead, Harvester Wheatsheaf
- Freeman, P. and Whish, R. (eds) 1991. *Butterworths Competition Law* (issue 0), London, Butterworths
- Furse, M. 1994. 'What price Competition?: Prices and the Law', *Solicitors Journal*, 928–929
- 1995. 'Competition Law and Effective Penalties', *Business Law Review*, 16, 134–137
- 1995b. 'The "Essential Facilities" Doctrine in Community Law', *European Competition Law Review*, 469–473



- 1996. 'Competition Law Reform Revisited', *Business Law Review*, 17, 247–250
- 1997. 'The Draft Competition Bill', *Business Law Review*, 18, 275–280
- 1998. 'The Competition Bill – a competition law that can compete', *Journal of Business Law*, 168–180
- Garza, D. A. 1995. 'The Microsoft Consent Decree', *Antitrust*, Fall, 21–25
- Gerber, D. J. 1998. *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford, Clarendon Press
- Glesne, C. and Peshkin, A. 1992 *Becoming Qualitative Researchers: An Introduction*, White Plains, NY, Longman
- Goyder, D. G. 1993. *EC Competition Law (2nd edn)*, Oxford, Oxford University Press
- 1998. *EC Competition Law (3rd edn)*, Oxford, Clarendon Press
- Greenhut, M. L. and Benson, B. 1989. *American Antitrust Laws in Theory and in Practice*, Avebury, Gower Publishing Co Ltd
- Grimes, W. S. 1995. 'The ABA Consent Decree: Reflections on Oversight of the Consent Process', *Antitrust*, Fall, 25–27
- Harberger, A. C. 1954. 'Monopoly and Resource Allocation', *American Economic Review*, 44, 77–92
- 1971. 'Three Basic Postulates for Applied Welfare Economics: An Interpretative Essay', *Journal of Economic Literature*, 9, 785–797
- Hawkins, K. 1990. 'Compliance Strategy, Prosecution Policy and Aunt Sally', *British Journal of Criminology*, 30, 444–466
- Hay, D. A. and Morris, D. J. 1991. *Industrial Economics and Organization: Theory and Evidence*, Oxford, Oxford University Press
- Heller, R. 1995. *The Fate of IBM*, London, Warner Books
- Howe, M. 1982. 'The Competition Act: Early Case Law', *European Competition Law Review*, 331–346
- Howitt, S. 1995. *Travel Agents and Tour Operators, 1995 Market Report*, Hampton Middlesex, Key Note
- Hunter, A. 1966. *Competition and the Law*, London, George Allen & Unwin Ltd
- Jones, C., Van der Woude, M., and Lewis, X. 1994. *EC Competition Law Handbook 1994 Edition*, London, Sweet and Maxwell
- Jonson, B. 1616(?). *The Devil is an Ass*, London, Nick Hern Books (1995)
- Jorde, T. M., Lemley, M. A., and Mnookin, R. H. (1996) *Antitrust (9th edn)*, Chicago, Harcourt Brace Legal and Professional Publications Inc
- Kaserman, D. L. and Mayo, J. W. 1995. *Government and Business: The Economics of Antitrust and Regulation*, Orlando, FL, The Dryden Press
- Kay, J. A. 1983. 'A General Equilibrium Approach to the Measurement of Monopoly Welfare Loss', *International Journal of Industrial Organisation*, 1, 317–331
- Kaysen, C. and Turner, D. F. 1959. *Antitrust Policy: An Economic and Legal Analysis*, Cambridge MA, Harvard University Press
- Kerse, C. S. 1994. *EC Antitrust Procedure (3rd edn)*, London, Sweet and Maxwell



- Kintner, E. 1980. *Federal Antitrust Law, Vol 1: Economic Theory, Common Law and an Introduction to the Sherman Act*, Cincinnati, Anderson Publishing Co
- Kolasky, W. J. 1997. 'Settling a Merger Investigation', (unpublished conference paper)
- Korah, V. 1986. 'EEC Competition Policy – Legal Form or Economic Efficiency', *Current Legal Problems*, 85–109
- 1994. *An Introductory Guide to EC Competition Law and Practice* (5th edn), London, Sweet and Maxwell
- Kovacic, W. E. 1996. 'Downsizing Antitrust: is it Time to end Dual Federal Enforcement?', *Antitrust Bulletin*, XLI, 505–540
- Kwoka, J. E. and White, L. J. (eds) 1994. *The Antitrust Revolution: The Role of Economics* (2nd edn), New York, HarperCollins College
- Labour Party, the. 1997. *New Opportunities for Business*, London, The Labour Party
- Landes, W. M. and Posner, R. A. 1981. 'Market Power in Antitrust Cases', *Harvard Law Review*, 94, 937–996
- Liesner, J. and Glynn, D. 1987. 'Does Anti-trust Make Economic Sense?', *European Competition Law Review*, 344–369
- Lipsey, R. G. 1989. *An Introduction to Positive Economics* (7th edn), London, Weidenfield and Nicholson
- Livingston, D. 1995. *Competition Law and Practice*, London, FT Law and Tax
- Lonbay, J. (ed.) 1994. *Frontiers of Competition Law*, Chichester, Wiley Chancery Law Publishing
- London Economics, 1994. *Barriers to Entry and Exit in UK Competition Policy* (OFT Research Paper No 2), London, Office of Fair Trading
- Maher, I. 1996. 'Alignment of Competition Laws in the European Community', 16 *Yearbook of European Law*, 223–242
- Maitland-Walker, J. 1995. 'Ice-cream Wars: An Honourable Peace or the Beginning of a Greater Conflict?', *European Competition Law Review*, 451–453
- Marston, P. 1996. 'Holiday Firms to Face Inquiry', *Telegraph*, 8 November
- Martin, S. 1994. *Industrial Economics: Economic Analysis and Public Policy* (2nd edn), New York, Macmillan
- Martinez, L. M. H. 1993. 'Predatory Pricing Literature under European Competition Law: The AKZO Case', *Legal Issues of European Integration*, 2, 95–128
- Melamed, A. D. 1995. 'Antitrust: The New Regulation', *Antitrust*, Fall, 13–15
- Monopolies and Mergers Commission, 1969. *Recommended Resale Prices: a report on the general effect on the public interest of the practice of recommending or otherwise suggesting prices to be charged on the resale of goods* (HC 100), London, HMSO
- 1970. *Refusal to Supply: a report on the general effect on the public interest of the practices of refusing to supply goods required for business purposes and of entering into certain exclusive supply agreements* (Cmnd 4372), London, HMSO
- 1980. *Tampons: a report on the supply in the United Kingdom of tampons* (Cmnd 8049), London, HMSO



- 1981a. *Full Line Forcing and Tie-In Sales: a report on the practice of requiring any person to whom goods or services are supplied to acquire other goods or services as a condition of that supply* (HC 212), London, HMSO
- 1981b. *Bicycles: a report on the application by TI Raleigh Industries and TI Raleigh Ltd of certain criteria for determining whether to supply bicycles to retail outlets* (HC 67), London, HMSO
- 1985. *Ford Motor Company Limited: a report on the policy and practice of the Ford Motor Company Ltd of not granting licences to manufacture or sell in the United Kingdom certain replacement body parts for Ford vehicles* (Cmnd 9437), London, HMSO
- 1986a. *Tampons: a report on the supply in the United Kingdom of tampons* (Cmnd 9705), London, HMSO
- 1989a. *Services of Professionally Regulated Osteopaths: A report on the supply of the services of professionally regulated osteopaths in relation to restrictions on advertising* (Cm 583), London, HMSO
- 1989b. *Black & Decker: a report on the course of conduct pursued by Black & Decker in relation to the supply of power tools and portable work-benches intended for domestic use* (Cm 805), London, HMSO
- 1989c. *Cross-Channel Car Ferries: a report on the existence or possible existence of a monopoly situation in relation to the supply in the United Kingdom of cross-Channel car ferry services and on a proposal to enter into agreements for the joint or co-ordinated supply of such services* (Cm 903), London, HMSO
- 1990a. *The Supply of Petrol: a report on the supply in the United Kingdom of petrol by wholesale* (Cm 972), London, HMSO
- 1990b. *The Supply of Cinema Advertising Services: a report on the supply in the United Kingdom of cinema advertising services* (Cm 1080), London, HMSO
- 1990c. *Plasterboard: A report on the supply of plasterboard in the United Kingdom* (Cm 1224), London, HMSO
- 1991a. *Soluble Coffee: a report on the supply of soluble coffee for retail sale within the United Kingdom* (Cm 1459), London, HMSO
- 1991b. *Carbonated Drinks: a report on the supply by manufacturers of carbonated drinks in the United Kingdom* (Cm 1625), London, HMSO
- 1991c. *Indirect Electrostatic Photocopiers: A report on the supply by manufacturers and importers of indirect electrostatic photocopiers in the United Kingdom* (Cm 1693), London, HMSO
- 1992a. *Cross-Solent Ferries: A report on the existence or possible existence of a monopoly situation in relation to the supply of ferry services between the Isle of Wight and the mainland of England* (Cm 1825), London, HMSO
- 1992b. *The Supply of Matches and Disposable Lighters: A report on the supply for retail sale in the United Kingdom of matches and disposable lighters* (Cm 1854), London, HMSO
- 1992c. *Television Broadcasting Services: A report on the publicising, in the course of supplying a television broadcasting service, of goods supplied by the broadcaster* (Cm 2035), London, HMSO
- 1993a. 'Focusing on the Public Interest' (Video), London, MMC
- 1993b. *Contact Lens Solutions: A report on the supply within the United Kingdom of contact lens solutions* (Cm 2242), London, HMSO



- 1993c. *Southdown Motor Services Limited: a report on the conduct of Southdown Motor Services Limited in respect of its operation of local bus services on routes 262 and 242 in Bognor Regis* (Cm 2248), London, HMSO
- 1993d. *Fine Fragrances: a report on the supply in the UK for retail sale of fine fragrances* (Cm 2380), London, HMSO
- 1994a. *Annual Review 1993: Focusing on the Public Interest*, London, Black Sun Plc
- 1994b. *Ice Cream: a report on the supply in the UK of ice cream for immediate consumption* (Cm 2524), London, HMSO
- 1994c. *The Supply of Recorded Music: A report on the supply in the UK of pre-recorded compact discs, vinyl discs and tapes containing music* (Cm 2599), London, HMSO
- 1995a. *Annual Review 1994*, London, Black Sun Plc
- 1995b. *The Supply of Bus Services in the North-East of England* (Cm 2933), London, HMSO
- 1996a. *Annual Review 1995*, London, Black Sun Plc
- 1996b. *Tambrands Ltd: a report on the granting of discounts by Tambrands Ltd on condition that the whole or part of the Tambrands range of tampons is stocked* (Cm 3168), London, HMSO
- 1996c. *Classified directory advertising services* (Cm 3171), London, HMSO
- 1997a. *Domestic Electrical Goods I: a report on the supply in the UK of televisions, video cassette recorders, hi-fi systems and camcorders* (2 vols, Cm 3675), London, Stationery Office
- 1997b. *Domestic Electrical Goods II: a report on the supply in the UK of washing machines, tumble driers, dishwashers and cold food storage equipment* (2 vols, Cm 3676), London, Stationery Office
- 1997c. *Foreign Package Holidays: a report on the supply in the UK of tour operators' services and travel agents' services in relation to foreign package holidays* (Cm 3813), London, Stationery Office
- Morrison, E., Sewell, A., Matthew, D., Elliott, D. and Parr, M. 1996. *Cost Benefit Assessment of Competition Inquiries and De Minimis Thresholds* (unnumbered OFT Research Paper), unpublished
- Murphy, J. E. 1991. 'Surviving the Antitrust Compliance Audit'. *Antitrust Law Journal*, 59, 953-970
- Myers, G. 1994. *Predatory Behaviour in UK Competition Policy* (OFT Research Paper 5), London, Office of Fair Trading
- Nash, S. and Furse, M. 1995. 'Self-Incrimination, Corporate Misconduct, and the Convention on Human Rights', *Criminal Law Review* 854-863.
- National Consumer Council, 1994. *Competition and Consumers*, London, National Consumer Council
- 1996. *Tackling Cartels and the Abuse of Market Power: Response to the DTI*, London, National Consumer Council
- Neale, A. 1970. *The Antitrust Laws of the USA*, Cambridge, Cambridge University Press
- National Economic Research Associates, 1997, *The Effectiveness of Undertakings in the Bus Industry* (OFT Research Paper 14), London, Office of Fair Trading
- Office of Fair Trading, 1988a, *Becton Dickinson UK Limited: The Supply of Hypodermic Syringes and Hypodermic Needles*, London, Office of Fair Trading
- 1988b. *The Southern Vectis Omnibus Company Limited: refusal to allow access to Newport Bus Station, Isle of Wight*, London, Office of Fair Trading



- 1989a. *West Yorkshire Road Car Company Limited: fares policy on certain routes between Bradford and Skipton*, London, Office of Fair Trading
- 1989b. *Highland Scottish Omnibuses Limited: local bus services in Inverness*, London, Office of Fair Trading
- 1989c. *South Yorkshire Transport Limited: the registration and operation of services 74 between High Green and Sheffield*, London, Office of Fair Trading
- 1990a. *Kingston Upon Hull City Transport Limited: local bus services in Kingston Upon Hull*, London, Office of Fair Trading
- 1992a. *Southdown Motor Services Ltd: the registration and operation of services 262 and 242 in Bognor Regis*, London, Office of Fair Trading
- 1993a. *Annual Report of the Director General of Fair Trading 1992*, London, HMSO
- 1993b. *Anti-Competitive Practices: A Guide to the Provisions of the Competition Act 1980*, London, HMSO
- 1993c. *Thamesway Limited: the operation of local bus services commencing in, terminating in or passing through Southend-on-Sea*, London, Office of Fair Trading
- 1994a. *Annual Report of the Director General of Fair Trading 1993*, London, HMSO
- 1994b. *Fife Scottish Omnibuses Limited: the conduct of the company in respect of the registration of commercial bus services in the Fife Region of Scotland*, London, Office of Fair Trading
- 1994c. *Wrigley Gives Assurances on Chewing Gum* (Press Release, 12 April 1994), London, Office of Fair Trading
- 1995a. *Annual Report of the Director General of Fair Trading 1994*, London, HMSO
- 1995b. *Monopolies and Anti-Competitive Practices: A guide to the provisions of the Fair Trading Act 1973 and the Competition Act 1980*, London, HMSO
- 1995c. *United Automobile Services Ltd: the operation of local bus services in Darlington*, London, Office of Fair Trading
- 1996a. *Annual Report of the Director General of Fair Trading 1995*, London, HMSO
- 1996b. *Tour Operators and Travel Agents Referred to MMC* (Press Release, 46/96, 7 November 1996), London, Office of Fair Trading
- 1996c. *Register of Undertaking and Orders under the Competition Act 1980 and the Monopoly Provisions of the Fair Trading Act 1973*, London, Office of Fair Trading
- 1997a. *Photocopier Industry Cleans up its Selling Practices* (Press Release, 9/97, 20 March 1997), London, Office of Fair Trading
- nd. *The Restrictive Trade Practices Act and the Bus Industry*, London, Office of Fair Trading
- OFTel, 1997. *Provision of Directory Information Services and Products (Consultative Document)*, London, Office of Telecommunications
- Page, W. H. 'The Scope of Liability for Antitrust Violations', *Stanford Law Review*, 37, 1445–1512
- Pennington (pseudonymous). 1996a. 'Bags Packed for the MMC', *The Times*, 8 November
- 1996b. 'Ronson's Rebound Gathers Pace', *The Times*, 12 December
- Peritz, R. J. R. 1996. *Competition Policy in America, 1888–1992: History, Rhetoric, Law*, New York, Oxford University Press



- Porter, M. P. 1980. *Competitive Strategy: Techniques for Analyzing Industries and Competitors*, New York, The Free Press
- 1985. *Competitive Advantage: Creating and Sustaining Superior Performance*, New York, The Free Press
- Posner, R. A. 1976. *Antitrust Law: An Economic Perspective*, Chicago, The University of Chicago Press
- 1979. 'The Chicago School of Antitrust Analysis', *University of Pennsylvania Law Review*, 127, 925–948
- Pratley, N. 1996. 'OFT Wants Tour Cover Clampdown', *The Telegraph*, 21 October
- Puzo, M. 1969. *The Godfather*, London, William Heinemann Ltd
- Raven, R. D. 1977. 'Suggestions for an Effective Compliance Program from the Perspective of Outside Counsel', *Antitrust Law Journal*, 46, 482–489
- Ravikoff, R. 1983. 'Establishing an Antitrust Compliance Program', *Florida Bar Journal* 57, 254–257
- Reguly, E. 1996. 'MMC Caps Classifieds in BT's Yellow Pages', *The Times*, 22 March
- Robertson, A. and Williams, M. 1995. 'An Ice-Cream War: The Law and Economics of Freezer Exclusivity', *European Competition Law Review*, 7–20
- Rodger, B. J. 1996. 'A Response to Brent: "Complex Monopoly": Oligopoly, the Public Interest and the Pursuit of Certainty', *European Competition Law Review*, 344–346
- Rose, V. (ed), 1993. *Bellamy and Child: Common Market Law of Competition* (4th edn), London, Sweet and Maxwell
- Sawyer, M. C. 1980. 'Monopoly Welfare Loss in the UK', *The Manchester School*, 331–354
- Scherer, F. M. 1987. 'Antitrust, Efficiency, and Progress', *New York University Law Review*, 62, 998–1019
- Scherer, F. M. and Ross, D. 1990. *Industrial Market Structure and Economic Performance* (3rd edn), Boston, Houghton Mifflin Co
- Scholes, J. 1998. 'The UK Draft Competition Bill: Comments Based on Observations of the Competition Law Association', *European Competition Law Review*, 32–45
- Sharpe, T. 1983. 'Refusal to Supply', *Law Quarterly Review*, 99, 36–67
- Shenefield, J. H. and Stelzer, I. W. 1996. *The Antitrust Laws: A primer* (2nd edn), Washington, AEI Press (the American Enterprise Institute)
- Sibree, W. 1995. 'Ice Cream War: In Defence of the MMC', *European Competition Law Review*, 203–204
- Sigler, J. A. and Murphy, J. E. 1988. *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion*, New York, London, Quorum Books
- Singleton, R. A., Straits, B. C. and Straits, M. M. 1993. *Approaches to Social Research*, Oxford, Oxford University Press
- Smith, P. 1989. 'The Wolf in Wolf's Clothing: The Problem with Predatory Pricing', *European Law Review*, 209–222
- Stigler, G. 1956. 'The Statistics of Monopoly and Merger', *Journal of Political Economy*, 64, 33–40
- 1982. 'The Economists and the Problem of Monopoly', *American Economic Review*, 72, 1–11



- Strauss, A. and Corbin, J. 1990. *Basics of Qualitative Research: Grounded Theory Procedures and Techniques*, Newbury Park, Ca., Sage Publications
- Sullivan, E. T. (ed.) 1991. *The Political Economy of the Sherman Act: The First One Hundred Years*, New York and Oxford, Oxford University Press
- Sullivan, E. T. and Hovenkamp, H. 1994. *Antitrust Law, Policy and Procedure: Cases, Materials and Problems (3rd edn)*, Charlottesville, The Michie Company
- Thompson, S. C. 1996. 'A Proposal for Antitrust Merger Enforcement Reform: Repudiating Judge Bork in Favor of Current Economic Learning', *Antitrust Bulletin* XLI, 79-136
- Thomson Corporation, the. 1996. *Annual Report 1995*
- Thorelli, H. B. 1954. *The Federal Antitrust Policy: Origination of an American Tradition*, (Stockholm?), Kungl, Boktryckeriet P A & Soner [now from Chicago, University Microfilms International]
- Tollison, R. D. and Congleton, R. D. (eds) 1995. *The Economic Analysis of Rent Seeking*, London, Edward Elgar
- Toohar, P. 1995. 'Tour Operators Deny Setting up "Cartel"', *Independent on Sunday*, 20 August
- Utton, M. 1994. 'Anticompetitive Practices and the Competition Act 1980', *Antitrust Bulletin*, 39, 485-539
- Van Overbeek, B. J. 1994. 'The Right to Remain Silent in Competition Investigations: The *Funke* Decision of the Court of Human Rights Makes Revision of the ECJ's Case Law Necessary', *European Competition Law Review*, 127-133
- Vaughan, D. 1983. *Controlling Unlawful Organizational Behaviour: Social Structure and Corporate Misconduct*, Chicago, University of Chicago Press
- Wall, M. 1996. 'Holiday Industry set to Climb above Turbulence', *The Times*, 23 November
- Walton, C. C. and Cleveland, F. W. 1964. *Corporations on Trial: The Electric Cases*, Belmont CA, Wadsworth Publishing
- Weiner, M. L. 1995. 'Antitrust and the Rise of the Regulatory Consent Decree', *Antitrust*, Fall, 4-8
- Weiss, L. W. (ed.) 1989. *Concentration and Price*, Cambridge, MA, MIT Press
- Whish, R. and Sufrin, B. 1993. *Competition Law (3rd ed)*, London, Butterworths
- White, L. J. 1995. 'Stern Business: Antitrust vs Microsoft: Who Won?', internet at: [gopher://swis.stern.nyu.edu.70/00/OrgSt/St-Bus/Antitrust](http://gopher://swis.stern.nyu.edu.70/00/OrgSt/St-Bus/Antitrust)
- Whitney, S. N. 1958, *Antitrust Policies: American Experience in Twenty Industries (2 vols)*, New York, The Twentieth Century Fund
- Wilberforce (Lord), Campbell, A. and Elles, N. 1966. *The Law of Restrictive Trade Practices and Monopolies (2nd ed)*, London, Sweet and Maxwell
- Williams, A. 1972. 'Cost-Benefit Analysis: Bastard Science? and/or Insidious Poison in the Body Politick?', *Journal of Public Economics*, 1, 199-225
- Wolmar, C. and Foster, J. 1994. 'Surfeit of Buses Threatens to Kill off Company', *The Independent* 9 November

OFFICIAL GOVERNMENT PUBLICATIONS OTHER THAN OFT/MMC PUBLICATIONS (BY COMMAND/HC NUMBER)

Cmd 6527, 1944. *White Paper on Employment Policy*, London, HMSO



- Cmnd 7198, 1978. *A Review of Monopolies and Mergers Policy: A Consultative Document*, London, HMSO
- Cmnd 7512, 1979. *A Review of Restrictive Trade Practices Policy: A Consultative Document*, London, HMSO
- Cm 2100, 1992. *Abuse of Market Power: A Consultative Document on Possible Legislative Options*, London, HMSO
- HC 249, 1995. *Trade and Industry Committee Fifth Report: UK Policy on Monopolies*, Vols 1-6, London, HMSO